Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Customs and Patent Appeals and the United States Customs Court

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decisions

(T.D. 79–158)

Countervailing Duties—Certain Fasteners from Japan

Notice of countervailing duties to be imposed under section 303, Tariff Act of 1930, as amended, by reason of the payment, or bestowal of a bounty or grant upon the manufacture, production or exportation of certain industrial fasteners from Japan

TITLE 19—CUSTOMS DUTIES

Chapter 1—U.S. Customs Service, Department of the Treasury

PART 159—LIQUIDATION OF DUTIES

AGENCY: U.S. Customs Service, Treasury Department.

ACTION: Final countervailing duty determination and suspension of liquidation.

SUMMARY: This notice is to inform the public that it has been determined that the Government of Japan has granted benefits which constitute bounties or grants within the meaning of the countervailing duty law on the manufacture and exportation of certain industrial fasteners from Japan. Estimated countervailing duties in the amount of these benefits will be collected in addition to duties normally due on shipments of this merchandise.

EFFECTIVE DATE: June 4, 1979.

FOR FURTHER INFORMATION CONTACT: David Chapman, Duty Assessment Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229; 202–566–5492.

SUPPLEMENTARY INFORMATION: On May 6, 1977, a countervailing duty order was published in the Federal Register with respect to certain industrial fasteners from Japan (T.D. 77–128, 41 F.R. 23146). As a result of that order, which applied to nuts and bolts entering the United States under items Nos. 646.54 and 646.56 of the Tariff Schedules of the United States (TSUS), a countervailing duty of 0.2 percent ad valorem was imposed. The programs found to constitute the be-

stowal of a bounty or grant within the meaning of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. 1303) (hereinafter referred to as the act), were: (1) The deferral of income taxes on export earnings under the Overseas Market Development Reserve (OMDR) and (2) export promotional assistance provided by the Japanese External Trade Organization (Jetro).

On March 23, 1979, a notice of "Receipt of countervailing duty petition and initiation of investigation" was published in the Federal Register (44 F.R. 17851). The notice stated that a petition in proper form was received on February 22, 1979, alleging that payments or bestowals conferred by the Government of Japan upon the manufacture, production, or exportation of certain industrial fasteners constitute the payment or bestowal of a bounty or grant within the meaning of section 303 of the act. The industrial fasteners referred to in that notice enter the United States under the following item numbers of the Tariff Schedules of the United States (TSUS): 646.17, 646.40, 646.41, 646.49, 646.51, 646.53, 646.58, 646.60, 646.63, 646.65, 646.72, 646.74, 646.75, 646.76, and 646.78.

On April 19, 1979, an "Amended notice of receipt of countervailing duty petition and initiation of investigation, and notice of preliminary countervailing duty determination" was published in the Federal Register (44 F.R. 23237). By this notice, the notice of March 23 was amended to include industrial fasteners which enter the United States under TSUS items Nos. 646.54 and 646.56. (The investigation has been limited to the determination of the bestowal of bounties or grants on nonmetric industrial fasteners). The April 19, 1979, notice stated that it had been determined preliminarily that benefits have been received by the Japanese manufacturers/exporters of certain industrial fasteners, which may constitute bounties or grants within the meaning of section 303 of the act. Specifically under the "Temporary Measures Act for Small and Midsize Businesses With Regard to the High Yen Exchange Market" which has been in operation since October 1977.

Based upon the information available to the Treasury, the Japanese industrial fastener industry is eligible for, and, in fact, receives, benefits under the program established under the "Temporary Measures Act for Small and Midsize Businesses With Regard to the High Yen Exchange Market". This program established a number of methods by which the Government of Japan can provide assistance to small and midsize Japanese firms which export and whose competitiveness has been adversely affected by the rapid appreciation of the yen. Assistance is provided in the form of: (1) Low cost loans; (2) deferment of repayment of loans; (3) the right to carry back current losses related to yen appreciation up to 3 years to offset income,

corporate and local taxes paid in prior years; and (4) special government credit guarantees for firms affected by yen appreciation over and above those otherwise offered to small and midsize businesses.

In light of the eligibility criteria, which limit utilization of the program to firms which export, this program clearly constitutes the bestowal of a bounty or grant within the meaning of the act. In the context of the Treasury's outstanding countervailing duty order (T.D. 77–128) concerning certain fasteners from Japan, published in the Federal Register of May 6, 1977 (42 F.R. 23146), the Treasury requested, on November 7, 1978, information from the Government of Japan regarding the degree of utilization of these various forms of assistance. Based upon the information supplied, it is apparent that the fastener industry has utilized at least some forms of the assistance; however, the data supplied is inadequate to allow a definitive calculation of the benefits bestowed or to identify the extent of utilization of the program by individual Japanese fastener manufacturers/exporters.

Since the November 7, 1978, request for information inquired into the extent to which benefits had been received by members of the Japanese fastener industry, which industry manufacturers/exports the TSUS item numbers covered in this instant investigation, under the programs established under the "Temporary Measures Act for Small and Midsize Businesses With Regard to the High Yen Exchange Market", it was not necessary to again request that information, for purposes of the instant investigation.

After consideration of all the information received, it is hereby determined that exports of certain fasteners from Japan benefit from bounties or grants, in consequence of the program described above within the meaning of section 303 of the act.

Accordingly, notice is hereby given that certain fasteners covered under TSUS items Nos. 646.54 and 646.56, covered under T.D. 77–128, are benefiting from additional bounties or grants within the meaning of section 303 of the act. The aggregate estimated benefit to exports of these fasteners is 4.2 percent ad valorem. Further, notice is hereby given that certain fasteners covered under TSUS items Nos. 646.17, 646.40, 646.41, 646.49, 646.51, 646.53, 646.57, 646.58, 646.60, 646.63, 646.65, 646.72, 646.74, 646.75, 646.76, and 646.78, are benefiting from bounties or grants under the program described above, within the meaning of section 303 of the act. The aggregate estimated benefit to exports of these fasteners is 4 percent ad valorem. These estimates have been made in the absence of information regarding benefits specifically conferred on manufacturers producing these fasteners. Absent exact data on which the benefits received may be precisely quantified, these amounts are sufficient to protect the revenue. Estimates of the

net amount of such bounties or grants will be reviewed upon receipt of information of the precise benefit received by individual Japanese fastener manufacturers/exporters.

Accordingly, notice is hereby given that the merchandise which is the subject of this determination, imported directly or indirectly, from Japan, is entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the Federal Register will be subject to the payment of countervailing duties equal to the net amount of any bounty or grant determined or estimated to have been paid or bestowed. Any merchandise subject to the terms of this order shall be deemed to have benefited from a bounty or grant if such bounty or grant has been or will be credited or bestowed, directly or indirectly, upon the manufacture, production or exportation of such fasteners.

In accordance with section 303 of the act, and until further notice, the net amount of such bounties or grants has been estimated and declared to be 4.2 percent ad valorem in the case of certain fasteners covered under TSUS items Nos. 646.54 and 646.56, and 4 percent ad valorem in the case of certain fasteners covered under TSUS items Nos. 646.17, 646.40, 646.41, 646.49, 646.51, 646.53, 646.58, 646.60, 646.63, 646.65, 646.72, 646.74, 646.75, 646.76, and 646.78.

Effective on the date of publication of this notice in the Federal Register and until further notice, upon the entry, or withdrawal from warehouse for, consumption of this merchandise imported directly or indirectly from Japan, which benefits from these bounties or grants, there shall be deposited, in addition to any other duties estimated or determined to be due, countervailing duties in the amount estimated in accordance with the above declaration. To the extent it can be established to the satisfaction of the Commissioner of Customs that imports of the merchandise covered by this determination are benefiting from a bounty or grant smaller than the amount which otherwise would be applicable under the above declaration, the smaller amount so established shall be deposited.

The table in section 159.47(f) of the Customs Regulations 19 CFR 159.47(f)) is amended by inserting after the last entry for Japan under the commodity heading "certain fasteners" the number of this Treasury decision in the column headed "Treasury decision" and the words "bounty declared-rate" under the column headed "action".

(R.S. 251, secs. 303, as amended 624; 46 Stat. 687, as amended, 759 (19 U.S.C. 66, 1303, 1624).)

Pursuant to Reorganization Plan No. 26 of 1950 and Treasury Department Order 190, revision 15, March 16, 1978, the provisions of Treasury Department Order No. 165, revised, November 2, 1954, and section 159.47(d) of the Customs Regulations (19 CFR 159.47(d)),

insofar as they pertain to the issuance of a countervailing duty order by the Commissioner of Customs, are hereby waived.

MAY 29, 1979.

ROBERT H. MUNDHEIM,
General Counsel of the Treasury.

[Published In Federal Register June 4, 1979, (44 F.R. 31972)]

(T.D. 79–159)

Public Law 95–410—Customs Regulations Amended

Parts 10, 11, 18, 19, 54, 111, 112, 133, 134, 148, 151, 162, Customs Regulations, relating to recordkeeping, reporting by customhouse brokers, trademarks, and the disposition of forfeited distilled spirits, wines, and malt liquor, amended

TITLE 19—CUSTOMS DUTIES

CHAPTER I—U.S. CUSTOMS SERVICE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: Public Law 95–410, the Customs Procedural Reform and Simplification Act of 1978 (the act), made numerous changes to the Tariff Act of 1930. One significant change was to require that records of the type normally kept in the ordinary course of business be made pertaining to the importation of merchandise and furnished to Customs, upon request, for examination and inspection. The act also required licensed customhouse brokers to file a status report with Customs on specified dates. In addition, the act modified the procedures relating to the importation, seizure, and disposal of articles having a U.S.-registered trademark, and the disposal of imported liquor forfeited to the Government.

This document amends various parts of the Customs Regulations to reflect these changes and to specify how long certain records must be retained by the public for possible Customs examination and inspection.

The regulations also are being amended to reflect the administrative practice of granting, for good cause, an extension of time in which an importer may comply with the country of orgin marking requirements for imported merchandise or redeliver to Customs improperly marked merchandise.

EFFECTIVE DATE: June 5, 1979.

FOR FURTHER INFORMATION CONTACT: The following individuals at the U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229;

Allard D'Heur, Inspection and Control Division, 202–566–5354, (amendments to secs. 10.62, 18.7, 112.29, Customs Regulations);
Marcus Sircus, Regulatory Audit Division, 202–566–2812 (amendments to secs. 10.24, 10.90, 19.16, 54.6, 148.90. 151.44, Customs Regulations);
Bob Gray, Duty Assessment Division, 202–566–5307 (amendment to sec. 54.6, Customs Regulations);
John E. Elkins, Regulations and Legal Publications Division, 202–566–8237 (amendments to remaining sections of Customs Regulations).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Public Law 95–410, the Customs Procedural Reform and Simplification Act of 1978 (the act), was approved on October 3, 1978.

Two of the major objectives of the act are:

1. To permit the establishment of more efficient and flexible procedures for handling the documentary and financial aspects of import transactions while insuring compliance with Customs laws and the collection of accurate import statistics, and

2. To modify Customs procedures to expedite the processing of goods and individuals while reducing administrative costs for the Government.

To carry out these objectives, numerous provisions of the Tariff Act of 1930 (the Tariff Act) were amended. These amendments necessitated many changes to the Customs Regulations.

Accordingly, on November 16, 1978, Customs published a notice in the Federal Register (43 F.R. 53461) of a proposal to amend its regulations to implement the recordkeeping requirements, reporting requirements of customhouse brokers, the importation, seizure, and disposal of articles having a U.S.-registered trademark, and the disposal of imported liquor forfeited to the Government. Additional provisions of the act which required amendments to the Customs Regulations are the subject of other documents published in the Federal Register.

Many comments were received in response to the notice published on November 16, 1978. The majority of the comments related to the proposed recordkeeping requirements to be included in part 162, Customs Regulations. A few comments were made on the proposed trademark provisions of part 133. The remaining comments related to the proposed reporting requirements for customhouse brokers in part 111. As explained below, these comments have resulted in numerous changes to the proposed amendments.

DISCUSSION OF MAJOR COMMENTS

I. RECORDKEEPING, INSPECTION, SEARCH AND SEIZURE

1. One commenter stated that all of the purposes for which an investigation or inquiry may be conducted should be set forth in the scope paragraph of part 162, Customs Regulations, as they are set forth in section 509(a) of the Tariff Act (19 U.S.C. 1509(a)). Section 509(a) provides that an investigation or inquiry may be conducted for the purpose of ascertaining the correctness of any entry, for determining the liability of any person for duties and taxes due or which may be due, for determining liability for fines and penalties, or for insuring compliance with the laws administered by Customs. Proposed section 162.0, the scope paragraph, mentions only the last purpose.

Customs was of the opinion that the phrase "possible violations of the laws and regulations administered by Customs" was broad enough to cover the other three purposes. However, to eliminate any potential problems, section 162.0 has been redrafted to conform to the statutory language by including all the purposes for conducting an investigation or inquiry.

This same commenter objected to the use of the words "routine audit" in the scope paragraph in conjunction with the words "inquiry" or "investigation", because the statute mentions only investigation or inquiry.

Customs believes that the legislative history makes it quite clear that an audit is a type of inquiry which is within the scope of permissible activity. Accordingly, the word "audit" has not been deleted. However, because the audit may or may not be of a routine nature, the word "routine" has been deleted. Proposed section 162.0 has been redrafted to reflect these changes.

2. Two commenters pointed out that the language of proposed section 162.1 was too narrow. Under section 509(a)(2) of the Tariff Act, records required to be kept under section 508 of the Tariff Act may be summoned. However, records as used elsewhere in section 509 is not limited to records required to be kept under section 508. For example, records relating to any law or regulation administered by Customs may be examined under section 509(a)(1) to insure compliance with those laws or regulations. Accordingly, the definition of records in section 162.1a(a) has been modified to broaden the language. Section 162.1d has been modified for the same reason.

Other commenters noted that section 508 of the Tariff Act, when indicating that certain persons shall make and render records for examination, includes not only records which pertain to an importation, but also "information contained in the documents required by the Tariff Act in connection with the entry of merchandise". Because

Customs agrees that the scope of proposed section 162.1a(a)(1)(i) is too narrow, the language has been revised to broaden its coverage to include records which pertain to any importation or to the information contained in the documents required to be kept.

Another commenter objected to the use of the words "technical data" and "correspondence" in the definition of "records". Customs is of the opinion that correspondence and technical data are "documents" and "papers" which it has a right to examine for the purposes set forth in the Tariff Act. The phrase "technical data" is used in the Tariff Act, and the definition adopted for "technical data" in proposed section 162.1a(a) is taken from the House Report 95–621, page 8.

Several commenters objected to the use of the word "forfeitures" in proposed section 162.1a(a)(1)(iii)(D). The word also appears in proposed section 162.1d(a)(1). The commenters contended that because there is no authority under the Tariff Act to require the making or keeping of records which relate to liability for forfeitures, the word "forfeitures" should be deleted.

Customs is of the opinion that there is authority under the Tariff Act to examine records to determine liability for fines and penalties, and that the words "fines and penalties" are used in the act in a broad sense to describe the various sanctions available to Customs, including liability for "forfeitures". Accordingly, even though the Act refers only to fines and penalties, Customs does not believe the proposed language should be changed.

Three commenters stated the reference in proposed section 162.1a(a)(iii)(E) to records which "insure compliance" is confusing. The commenters indicated that if it is the intention of the section to describe records which permit Customs to determine whether the importer has complied with the laws and regulations, the section should be redrafted. Customs agrees with the commenters, and the section has been redrafted as suggested.

Based upon Customs review, the definition of "summons" in proposed section 162.1a(c) has been redrafted to indicate that a summons may require the production of records, the giving of testimony, or both. Because testimony need not relate to records, this section has been modified to delete this qualification.

3. One commenter believed that proposed section 162.1b should state that the existence of records is subject to verification and set out the sanctions available for refusal or failure to keep records.

Customs believes it is implicit in the act and proposed regulations that verification of the existence of records may take place. For example, the third party recordkeeper provisions specify that section 509 does not apply to any summons to determine whether or not records of the import transactions of an identified person have been

made or kept. The manner in which verification may be accomplished is to issue a summons for the purpose of "insuring compliance with the laws and regulations administered by Customs" (i.e., recordkeeping requirements). Upon failure to comply, an action may be initiated by Customs in the U.S. District Court to enforce the summons. If the person thereafter fails to produce records, that person may be held in contempt of court, and further importation of that person's merchandise, directly or indirectly, or the importation of merchandise for that person's account, may be prohibited.

The same commenter also objected to the example used to illustrate that a person ordering merchandise from an importer in a domestic transaction does not knowingly cause merchandise to be imported and is not required to make or keep records unless "the terms and conditions of importation are controlled by the person placing the order". The point was made that knowledge and control are the important factors, as opposed to legal relationship. While this is true, the example utilized has all three factors (i.e. knowledge, control, and legal relationship) and fairly illustrates the point and, therefore, is being retained.

4. Several commenters noted that proposed section 162.1d makes no mention of the summoned person's right to legal counsel under 5 U.S.C. 555(b).

Customs does not believe that the statutory right to counsel is a matter which should be the subject of its regulations.

5. Several commenters inquired as to what is "reasonable notice" under proposed sections 162.1d (a) and (b), which provide for examination of records and issuance of summonses. These examinations are to be undertaken only after providing the person with "reasonable notice". The commenters noted that House Report 95–621, pages 10–11, indicated that reasonable notice was expected to mean action carried out at the mutual convenience of the parties, during normal business hours. The commenters are of the opinion that this expectation should be incorporated into the regulations.

Customs agrees that the examination or appearance under the summons should be during normal business hours. However, because no time may be convenient for certain persons, proposed sections 162.1d (a) and (b) have been revised to indicate that an examination or appearance shall be during normal business hours, and to the extent possible, at a time mutually convenient to the parties.

6. One commenter contended that the use of the qualifying phrase "with the consent of" in proposed section 162.1d(a) was inconsistent with the language of section 509 of the Tariff Act.

Customs agrees, and the phrase has been deleted. This same commenter noted that the individuals listed in proposed sections 162.1d(a)

and 162.1e(a) are not the same as those listed in the statute. While Customs believes those individuals listed in the proposed regulations would encompass all of the individuals listed in the statute, it concluded upon reviewing the section that any enumeration of individuals is unnecessary. Therefore, the listing has been deleted from the proposed regulations. The same comment also was made with respect to proposed section 162.1d(b). That section has been modified to follow the statutory language.

7. Several commenters stated that testimony taken under oath should be transcribed, and a copy should be made available to the witness. Customs agrees and has modified proposed section 162.1d(c) to indicate that when testimony is taken under oath, it shall be transcribed, and a copy shall be made available on request to the witness, unless for good cause shown under 5 U.S.C. 555(c), the issuing officer determines that a copy should not be provided. In that event the witness shall be limited to inspection of the official transcript of the testimony.

For purposes of proposed section 162.1d(c), Customs considers a transcript to include a record of the testimony by electronic means. That section has been modified to indicate that such testimony or transcript may be in the form of a written statement under oath provided by the person examined at the request of a Customs officer.

8. Another commenter recommended that proposed section 162.1d (b) be modified to indicate that the summons may require either the production of records, the giving of testimony, or both. Customs agrees, and the appropriate modifications have been made.

9. Two commenters recommended that the telephone number of the issuing officer be included in the summons. Customs agrees that this information is important in arranging an examination or appearance, and section 162.1e(a)(4) has been modified accordingly. Similarly, section 162.1e(a)(1) has been amended to include the telephone number of the Customs officer before whom the appearance shall take place.

10. Based upon an internal review, Customs has determined that proposed section 162.1f(a) should be modified to indicate that any Customs officer is authorized to serve a summons. However, only the Commissioner or his designee may issue a summons under section 162.1d(b). Those individuals designated to issue a summons are listed in Customs Delegation Order No. 55 (T.D. 79–10), published in the Federal Register on January 10, 1979 (44 F.R. 2217), and any amendments.

11. Several commenters contended that the 5-day notice of summons required to be given to a person identified in the description of the records contained in the summons in proposed section 162.1g(b) is

too short. The commenters cited 26 U.S.C. 7609(a)(2), which places a 14-day time limitation upon the Internal Revenue Service.

Customs agrees that 5 business days is not adequate and has increased the time to 10 business days. This will provide a minimum period of from 14 to 16 calendar days, depending upon the number of intervening weekends and Federal holidays.

One of these commenters stated that the notice should be issued at the same time service is made. Customs believes that because a minimum of 10 business days is provided before the examination, adequate notice will be provided even if it is not given at the same time the summons is issued.

Another commenter stated that the language in proposed section 162.1g(a), which enumerated the individuals to whom notice must be given, was too broad and did not follow the statutory language. Customs agrees and has modified the section accordingly.

12. One commenter pointed out that the phrase "or for his account" which appears in section 510(b)(1)(B), Tariff Act, did not appear in the sanctions listed in proposed section 162.1i. This section has been modified to include the appropriate language.

The commenter also pointed out that the phrase "failure of a person to comply with a summons" is not the same as the statutory language of "remain in contempt", which is found in section 509(b)(2), Tariff Act. Customs agrees and has redrafted section 162.1i accordingly.

13. Another commenter asked that a provision be added to indicate that records may be maintained outside the United States.

Customs does not believe that maintaining records outside the United States is conducive to proper enforcement of the act. In order that records pertaining to the importation of merchandise may be readily available for inspection, and to carry out the intent of the act, Customs is of the opinion that records required to be maintained by the act shall be located physically in the United States.

14. One commenter wanted U.S. consignees of Canadian merchandise who, through use of a customhouse broker acting as importer of record and paying duty on behalf of his Canadian client, receive the merchandise duty paid, and who presently do not keep records for U.S. Customs purposes, to be exempt from the recordkeeping requirements.

While there is no provision in the act which would except U.S. importers of Canadian merchandise in the circumstances described from the need to keep records required of all other importers, the records to be kept are designated by the act as records of the type which "are normally kept in the ordinary course of business". Thus, if records described above presently are not of a type kept in the ordinary course of business, there is no intention on the part of Customs to require the creation of a new class of records to burden the importers. Of

course, regardless of the classes of records required to be kept by all importers under this new statutory provision, importers will frequently find it in their own interest to retain additional data, regardless of its form, which would substantiate their claims for beneficial Customs valuation, classification, or other treatment, where that data would not ordinarily appear in their normal business records.

15. Finally, one commenter recommended that consideration be given to further reducing the record retention periods.

While the act establishes a 5-year period for retention of records, there are certain records which, in the opinion of Customs, need not be retained for the full 5-year period. There also are provisions in the regulations where no time limit is established or where a time limit of less than 5 years is established for records which Customs has concluded must be retained for the full 5-year period. Customs has identified certain records in the above categories. Following is a table describing these records and the retention period. These records are listed in the 1978 edition of the "Guide to Records Retention Requirement" published annually by the Office of the Federal Register. Records retention periods presently contained in various sections of the Customs Regulations are listed in the "Guide to Records Retention Requirements". The guide informs the public (1) what records must be kept, (2) who must keep them, and (3) how long they must be kept. The 1980 edition of that document will reflect the changes made herein.

The records retention requirements specified in this document shall apply to records presently required to be maintained by the Customs Regulations, as well as to records relating to entries or other transactions taking place on or after (30 days from publication in the Federal Register).

Customs Regulations section (19 CFR–)	Records to be maintained	Who must maintain records	Retention period now specified	Retention period
1. 10.8, 10.9—Articles exported for repairs, alterations or processing.	Certificate of registration	Owners, importers, consignees and agents.	2 years from date of final liquidation of final quantity covered by certificate of registration.	5 years from date of of related entry.
2. 10.24—Documentation.	Records of articles assembled abroad with U.S. components, showing quantities, sources, costs, dates shipped abroad, and other information necessary to waive certain entry requirements.	Importer and assembler.	None	5 years from date of related entry.
3. 10.62—Bunker fuel oil.	All pertinent records, including financial records relating to the withdrawal, delivery, or receipt of bunker fuel oil.	Withdrawer	None	5 years from date of liquidation of related entry.
4. 10.90—Master records and metal matrices.	Plant and account records relating to master records and metal matrices.	Importer and manufacturer.	None	5 years from date of related entry.
5. 18.7—Verification of lading for exportation.	Records of claims and settlements of export freight charges, and any other records which may relate to the transaction.	Exporting carrier	None	5 years from date of exportation of merchandise.

Customs Regulations section (19 CFR–)	Records to be maintained	Who must maintain records	Retention period now specified	Retention period
6. 19.16—Cigar-manufacturing warehouses.	Records of each transfer of scraps, cuttings, and clippings to cigar or tobacco manufacturer operating under internal revenue laws, and transfer applications.	Proprietor of class 6 bonded cigar manufacturing warehouse.	None	5 years from date of each transfer.
7. 19.34—Wheat	Records to verify handling and accounting for any increase or shortage.	Importers, exporters, warehouse proprietors, bonded common carriers, and others who handle imported wheat in Customs custody.	2 years after date of transaction.	5 years from date of transaction.
8. 54.6—Metal articles imported to be used in remanufacture by melting; proof of intent.	Plant and import records relating to remanufacture.	Importer or plant manager.	None	5 years from date of related entry.
9. 112.29—Licensing of cartmen and lightermen.	Written records relating to cartage and lighterage required by district directors of Customs,	Licensed cartmen and lightermen.	None	3 years from expiration of related contract of cartage or lighterage.

10. 148.90—Foreign military personnel.	Records relating to entry and withdrawal of alcoholic beverages by foreign military personnel under item 822.20, Tariff Schedules of the United States.	Warehouse proprietor.	At least 3 years from date of entry or withdrawal of the alcoholic beverages.	3 years from date of withdrawal of alcoholic beverages.
11. 151.44—Petroleum products subject to duty at a specific rate transferred to shore storage tanks.	Plans of each shore storage tank and certified gauge tables at oil company plant.	Storage tank proprietor	None	3 years from discontinuance of storage tanks as bonded warehouses for storage of imported petroleum products.

294-262—79——2

II. CUSTOMHOUSE BROKERS

1. One commenter expressed concern that the Customs field personnel possibly could interpret proposed section 111.30 so that a broker's license would be canceled because the broker was temporarily unemployed, semiretired, on leave between jobs, or for any other reason actually was not engaged in the brokerage business.

Customs field personnel do not have the authority to cancel a broker's license. Under procedures set forth in subpart D, part 111, Customs Regulations, a broker's license may be canceled only by the Commissioner of Customs. Further, Customs does not regard inactivity as a basis for cancellation.

2. Section 641 of the Tariff Act specifically requires reports on February 1, 1979, and on February 1 of each third year thereafter, stating whether the broker is actively engaged in business and the name under, and the address at which, business is being transacted. Proposed section 111.30 states the report may be filed before the February 1 date, One commenter correctly indicated that Customs would not want a report due on February 1, 1982, to be filed on January 1, 1980. To prevent this from occurring, the commenter recommended that the words "or before" be deleted from the proposal.

Customs believes it is unreasonable to expect every report to be filed on February 1 of a given year. The purpose of the law was to determine the status of a broker at a particular point in time (i.e., February 1 of every third year). If a report is received before February 1, the status may change before that date. To make the reporting requirement more reasonable, Customs believes a grace period should be given. Accordingly, proposed section 111.30 has been modified to provide that reports shall be filed on February 1, 1979, and on February 1 of each third year thereafter. However, a report received during the month of February will be considered as filed timely.

3. A commenter also pointed out that section 641 of the Tariff Act requires a report, but proposed section 111.30 requires two reports (one to be filed with headquarters and one with the district director). The commenter suggests that one report filed with headquarters should be sufficient.

Initially it should be noted that only one report is required. The original is to be sent to Customs headquarters, with a copy of that report to be sent to each district director in whose district the broker is transacting business. Each district director will compile and make available to the public a current list of brokers licensed in the district based upon the information submitted in the copy of the report sent to the district director. This list is of benefit to the public seeking a broker to handle their Customs transactions, to Customs officers, and to the brokers themselves. Accordingly, the requirement that a

copy of the report be submitted to each district director in whose district business is being transacted is retained.

4. A commenter noted that proposed section 111.30 uses the phrase "transacting Customs business" and indicated that a broker might transact some sort of Customs business as an individual, e.g., a resident returning from vacation, rather than in his capacity as a broker. The commenter recommended that the quoted language be changed to "transacting business as a customhouse broker". Customs agrees with this comment and section 111.30 has been revised accordingly.

5. The commenter also indicated that the proposed regulation would require the individual broker to list his branch offices in each Customs district for which he is licensed and noted that there is no authority for the requirement. Customs agrees and this requirement has been deleted.

6. The same commenter recommended that section 111.52, relating to revocation of a broker's license by operation of law, be modified to indicate that if a report is not received within 60 days after due, it will be assumed that the broker is no longer active, and Customs will "close" the broker's license. A broker would be eligible to do business again if the report were filed thereafter.

Customs does not agree with this recommendation. Failure to file the report when due could be a basis for revocation or suspension of the license for failure to comply with the reporting requirement. The fact, however, that a broker is "inactive" is not a basis for cancellation of, or to "close", the license.

III. TRADEMARKS

1. One commenter objected to that portion of proposed section 133.25, which states that the Commissioner of Customs shall dispose of forfeited trademarked articles after obliteration of the trademark "where feasible". The regulatory language is derived directly from section 526(e) of the Tariff Act, as amended by the act. Because Congress has evidenced its intention that the trademark be obliterated only where feasible, Customs believes it has no authority to modify the requirement.

2. Several commenters contended that proposed section 133.25 was deficient in that it failed to provide the importer of goods bearing allegedly counterfeit trademarks a means of contesting a determination that the trademarks are counterfeit. The commenters believed that the section should be revised to provide for an appeal procedure.

Customs is of the opinion that there are already adequate procedures in the regulations to contest or appeal a decision. For example, part 171 provides procedures for petitioning for relief from fines, penalties, and forfeitures; section 174.11(d) authorizes the filing of a

protest from the exclusion of merchandise from entry or delivery under any provision of the Customs laws; and section 177.11(b) sets forth a procedure for obtaining internal advice.

3. One commenter noted that proposed section 133.22(c) indicates that unless the trademark owner consents to some other disposition, merchandise bearing a counterfeit trademark will be disposed of in accordance with section 133.25. The commenter pointed out that this appears to be in conflict with the right of the importer to petition for relief under part 171, Customs Regulations. The commenter recommended that section 133.22(c) be qualified to take into account the availability of this right to petition. While Customs does not believe there is a conflict, the provision has been modified to clarify that there is a right to petition for relief and incorporated in a new section 133.23a.

4. Two commenters objected to the provisions of proposed section 133.25(c), which provides for sale of forfeited trademarked articles. The commenters stated that the provision would have the effect of putting merchandise bearing a counterfeit trademark into the commerce of the United States even if the trademark were obliterated, thus displacing the sale of legitimate articles. The commenters were of the opinion the articles should be destroyed. The commenters further suggested that royalties could be denied if the trademarked articles also were copyrighted.

While sympathetic to these arguments, Customs is bound to follow the disposition provisions set forth in section 526(e) of the Tariff Act, from which proposed section 133.25(c) is derived.

5. Based upon Customs review, it has been concluded that the language of proposed section 133.25 would be more appropriate in present section 133.52 of the regulations (19 CFR 133.52). Accordingly, the language of proposed section 133.25 is incorporated as a new paragraph (c) in present section 133.52.

6. Because section 5.26(e) of the Tariff Act, added by Public Law 95–410, relates only to the seizure and forefeiture of articles bearing a counterfeit trademark, a new section 133.23a, concerning seizure and notification procedures, and a new section 133.52(c), relating to disposition procedures, applicable to such articles, have been added to the regulations, and the provisions of sections 133.21, 133.23(b), and 133.51 have been limited in scope to articles other than those bearing a counterfeit trademark.

IV. EDITORIAL CHANGE

As a part of the conforming amendments required by Public Law 95–410, published in the Federal Register as T.D. 78–394 on October 25, 1978 (43 F.R. 49784), section 148.84, Customs Regulations,

was amended. This section implemented section 215 of the act, which prohibits admission of the baggage and effects without entry for all individuals returning to the United States, except where otherwise provided by law; and provides that no individual shall be entitled to expedited Customs examination and clearance of his or her baggage and effects except under special circumstances, including when that individual is seriously ill or infirm, summoned home by news of affliction or disaster, or accompanying the body of a deceased relative. Because the title to subpart I of part 148, Customs Regulations, Personnel of Foreign Governments and International Organizations, no longer is descriptive of section 148.84, the subpart title has been changed to Subpart I—Personnel of Foreign Governments and International Organizations and Special Treatment for Returning Individuals.

V. COUNTRY OF ORIGIN MARKING

Section 304 of the Tariff Act requires, with certain exceptions, that every article of foreign origin imported into the United States shall be marked with the name of the country of origin in a conspicuous place as legibly, indelibly, and permanently as the nature of the article will permit. If the imported article is found upon examination not to be marked properly, the district director sends a notice of redelivery (Customs form 4647) to the importer, giving him notice to properly mark the merchandise or return it to Customs custody for marking, exportation, or destruction.

Section 134.54(a), Customs Regulations (19 CFR 134.54(a)), provides that in the event the importer has not properly marked or redelivered the merchandise to Customs custody for marking, exportation, or destruction within 30 days from the date of notice of redelivery, the district director shall demand payment of liquidated damages incurred under the bond in an amount equal to the entered value of the articles not returned, plus any estimated duty as determined at the time of entry.

Under an administrative practice, however, Customs, for good cause, has been allowing an importer additional time to mark the merchandise properly or to redeliver it. Section 134.54(a) has been amended to reflect this practice.

INAPPLICABILITY OF E.O. 12044

This document is not subject to the Treasury Department directive implementing Executive Order 12044, Improving Government Regulations, because preliminary work on the subject matter was begun before May 22, 1978, the effectice date of the Department directive.

DRAFTING INFORMATION

The principal author of this document was John E. Elkins, Regulations and Legal Publications Division, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

AMENDMENTS TO THE REGULATIONS

Parts 10, 11, 18, 19, 54, 111, 112, 133, 134, 148, 151, and 162, Customs Regulations (19 CFR parts 10, 11, 18, 19, 54, 111, 112, 133, 134, 148, 151, 162), are amended as set forth below.

GEORGE C. CORCORAN, Jr.,
Acting Commissioner of Customs.

Approved: May 23, 1979.
RICHARD J. DAVIS,
Assistant Secretary of the Treasury.

[Published in the Federal Register June 4, 1979 (44 F.R. 31962)]

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. Sections 10.8(g), 10.8(h), 10.9(g), and 10.9(h) are amended by substituting the phrase "5 years from the date of the related entry of the merchandise" for "2 years after the final liquidation of the final quantity".

2. The last sentence of section 10.24(d) is amended to read as follows:

§ 10.24 Documentation.

* * * * * * *

(d) *Waiver of specific details for each entry.* * * * These records shall be maintained by the importer and assembler for 5 years from the date of the related entry in a manner so that they are readily available for audit, inspection, copying, reproduction, or other official use by authorized Customs officers.

* * * * * * *

3. A second sentence is added to section 10.62(f), to read as follows:

§ 10.62 Bunker fuel oil.

* * * * * * *

(f) * * * The withdrawer shall maintain all pertinent records relating to the withdrawal, delivery, or receipt of the fuel oil for 5 years from the date of liquidation of the related fuel oil entry.

4. A second sentence is added to section 10.90(b), to read as follows:

§ 10.90 Master records and metal matrices.

* * * * * * *

(b) * * * The importer (and the manufacturer, if the two are not identical) shall maintain plant and accounting records relating to the master records and metal matrices for 5 years from the date of the related entry of the merchandise.

(R.S. 251, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624).)

PART 11—PACKING AND STAMPING: MARKING

Section 11.13(d) is amended by substituting a comma for the period at the end of the section and adding "except articles disposed of under section 133.52(a) or (b) of this chapter."

(R.S. 251, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624).)

PART 18—TRANSPORTATION IN BOND AND MERCHANDISE IN TRANSIT

A third sentence is added to section 18.7(c) to read as follows:

§ 18.7 Landing for exportation, verification of.

* * * * * * *

(c) * * * The exporting carrier shall maintain these records for 5 years from the date of exportation of the merchandise.

(R.S. 251, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624).)

PART 19—CUSTOMS WAREHOUSES, CONTAINER STATIONS AND CONTROL OF MERCHANDISE THEREIN

The introductory material to section 19.16(h) immediately preceding the form is amended to read as follows:

§ 19.16 Cigar-manufacturing warehouses.

* * * * * * *

(h) Proprietors of premises bonded for the manufacture of cigars may remove scraps, cuttings, and clippings of tobacco producted in the premises for transfer to cigar or tobacco manufacturers operating under the internal revenue laws. The proprietor shall maintain a record for 5 years from the date of each transfer of scraps, cuttings, and clippings.

The application and permit for the transfer shall be in the following form:

APPLICATION AND PERMIT FOR TRANSFER OF SCRAPS, CUTTINGS, AND CLIPPINGS

* * * * * * *

2. The third sentence of section 19.34 is amended to read as follows:

§ 19.34 Customs supervision.

* * * These records shall be retained for a period of 5 years from the date of the transaction.

(R.S. 251, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624).)

PART 54—CERTAIN IMPORTATIONS TEMPORARILY FREE OF DUTY

Section 54.6(c) is amended by adding at the end thereof a new sentence to read as follows:

§ 54.6 Proof of intent; bond; proof of use; liquidation.

* * * * * * *

(c) * * * The importer and plant manager shall maintain the import and plant records for 5 years from the date of the related entry of the merchandise.

(R.S. 251, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624).)

PART 111—CUSTOMHOUSE BROKERS

1. Section 111.23(a) is amended by substituting "5 years" for "6 years" wherever it appears.

2. Section 111.25 is amended by substituting "in accordance with the provisions of section 162.1a through 162.1i" for "on demand".

3. Section 111.26 is amended by substituting "Except in accordance with the provisions of sections 162.1a through 162.1i, a" for "A" at the beginning of the section.

4. Section 111.50 is amended by changing the section heading and adding a new paragraph (d) to read as follows:

§ 111.30 Change of business address, organization, or name; status report.

* * * * * * *

(d) *Status report.*—Each customhouse broker shall file a status report with Customs on February 1, 1979, and on February 1 of each third year thereafter. A report received during the month of February will be considered filed timely. The report shall be filed with the Commissioner of Customs, U.S. Customs Service, Attention: Entry, Licensing and Restricted Merchandise Branch, Washington, D.C. 20229. A copy also shall be filed with the District Director of Customs in each district where the broker is licensed to transact Customs business. No form or particular format is required. Each individual broker shall state whether he is actively engaged in transacting business as a customhouse broker. If so, he shall state the name under, and the address at which, his business is conducted (if he is a sole

proprietor); or the name and address of his employer, unless his employer is a corporate, partnership or association broker for which he is a qualifying officer or member. The report of each corporation, partnership, or association shall state the name under which its business as a customhouse broker is being transacted, its business address, the names and addresses of the members of the partnership or officers of the corporation or association qualifying it for a license, and whether it is actively engaged in transacting business as a customhouse broker.

(R.S. 251, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624).)

PART 112—CARRIERS, CARTMEN, AND LIGHTERMEN

A second sentence is added to section 112.29(a) to read as follows:

§ 112.29 Records.

(a) *Records of cartage and lighterage.*—

* * * Cartmen and lightermen shall maintain these records for 3 years from the expiration date of the related contract for cartage or lighterage.

* * * * * * *

(R.S. 251, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624).)

PART 133—TRADEMARKS, TRADE NAMES, AND COPYRIGHTS

1. Section 133.21(c) is amended by deleting "or" at the end of subparagraph (5), replacing the period at the end of subparagraph (6) with a semicolon followed by the word "or", and adding a new subparagraph (7) to read as follows:

§ 133.21 Restrictions on importation of articles bearing recorded trademarks and trade names.

* * * * * * *

(c) *Restrictions not applicable.* * * *

(7) The articles of foreign manufacture bear a recorded trademark and the personal exemption is claimed and allowed under section 148.55 of this chapter.

2. Section 133.21 is further amended by adding a new paragraph (d) to read as follows:

(d) *Exceptions for articles bearing counterfeit trademarks.*—The provisions of paragraph (c)(4) of this section are not applicable to articles bearing counterfeit trademarks at the time of importation (see section 133.24).

3. Section 133.23(b) is amended by adding a new subparagraph (3) to read as follows:

§ 133.23 Release of detained articles.

* * * * * * *

(b) *Articles accompanying importer.* * * *

(3) The provisions of subparagraphs (1) and (2) are not applicable to articles bearing counterfeit trademarks at the time of importation (see sec. 133.24) or to trademarked articles exempt from import restrictions under section 526(d), Tariff Act of 1930, as amended (19 U.S.C. 1526(d)) (see section 148.55 of this chapter).

4. Part 133 is amended by adding a new section 133.23a to read as follows:

§ 133.23a Articles bearing counterfeit trademarks.

(a) *Definition.*—A "counterfeit trademark" is a spurious trademark which is identical with, or substantially indistinguishable from, a registered trademark.

(b) *Seizure.*—Any article imported into the United States bearing a counterfeit trademark shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violation of the Customs laws.

(c) *Notice to trademark owner.*—The owner of the trademark shall be notified of the seizure and the quantity of the articles seized. Unless the trademark owner, within 30 days of notification, provides written consent to importation of the articles, exportation, entry after obliteration of the trademark, or other appropriate disposition, the articles shall be disposed of in accordance with section 133.52, subject to the importer's right to petition for relief from the forfeiture under the provisions of part 171 of this chapter.

5. The introductory sentence to section 133.51(b) is amended to read as follows:

§ 133.51 Relief from forfeiture or liquidated damages.

* * * * * * *

(b) *Conditioned relief.*—In appropriate cases, except for articles bearing a counterfeit trademark, relief from a forfeiture may be granted pursuant to a petition for relief upon the following conditions and such other conditions as may be specified by the appropriate Customs authority:

* * * * * * *

6. Section 133.52 is amended to read as follows:

§ 133.52 Disposition of forfeited merchandise.

(a) *Trademark (other than counterfeit) or trade name violations.*—Articles forfeited for violation of the trademark laws, other than

articles bearing a counterfeit trademark, shall be disposed of in accordance with the procedures applicable to forfeitures for violation of the Customs laws, after the removal or obliteration of the name, mark, or trademark by reason of which the articles were seized.

(b) *Copyright violations.*—Articles forfeited for violation of the copyright laws shall be destroyed.

(c) *Articles bearing a counterfeit trademark.*—The Commissioner of Customs or his designee shall dispose of forfeited articles bearing a counterfeit trademark after obliteration of the trademark, where feasible, in the following manner:

(1) *Government use.*—By delivery to any Federal, State, or local government agency which, in the opinion of the Commissioner or his designee, has established a need for the article.

(2) *Gifts to charities.*—By delivery to any charitable institution which, in the opinion of the Commissioner or his designee, has established a need for the article.

(3) *Sale.*—If more than 1 year has passed since the forfeiture, the article may be sold at public auction by the Commissioner or his designee. Prior to sale, the Commissioner or his designee shall determine that a need for the article has not been established by any eligible government organization or charitable institution under paragraph (c)(1) or (c)(2) of this section.

(4) *Destruction.*—If the article is unsafe or a health hazard, it shall be destroyed.

(R.S. 251, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624).)

PART 134—COUNTRY OF ORIGIN MARKING

Section 134.54(a) is amended to read as follows:

§ 134.54 Articles released from Customs custody.

(a) *Demand for liquidated damages.*—If within 30 days from the date of the notice of redelivery, or such additional period as the district director may allow for good cause shown, the importer does not properly mark or redeliver the merchandise previously released to him, the district director shall demand payment of liquidated damages incurred under the bond in an amount equal to the entered value of the articles not properly marked or redelivered, plus any estimated duty thereon determined at the time of entry.

* * * * * * *

(R.S. 251, as amended, secs. 304, 624, 46 Stat. 687, as amended, 759 (19 U.S.C. 66, 1304, 1624).)

PART 148—PERSONAL DECLARATIONS AND EXEMPTIONS

1. Part 148 is amended by adding a new section 148.55 to read as follows:

§ 148.55 Exemption for articles bearing American trademark.

(a) *Application of exemption.*—An exemption is provided for trademarked articles accompanying any person arriving in the United States which would be prohibited entry under section 526, Tariff Act of 1930, as amended (19 U.S.C. 1526), or section 42 of the act of July 5, 1946 (60 Stat. 440; 15 U.S.C. 1124), because the trademark has been registered with the U.S. Patent Office and recorded with Customs. The exemption may be applied to those trademarked articles of foreign manufacture bearing a trademark owned by a citizen of, or a corporation or association created or organized within, the United States when imported for the arriving person's personal use in the quantities provided in paragraph (c) of this section. Unregistered and unrecorded trademarked articles are not subjct to quantity limitation.

(b) *Limitations.*

(1) *30-day period.*—The exemption in paragraph (a) of this section shall not be granted to any person who has taken advantage of the exemption for the same type of article within the 30-day period immediately prior to his arrival in the United States. The date of the person's last arrival on which he claimed this exemption shall be considered to be the date he last took advantage of the exemption.

(2) *Sale of exempted articles.*—If an article which has been exempted is sold within 1 year of the date of importation, the article or its value (to be recovered from the importer) is subject to forfeiture. A sale subject to judical order or in the liquidation of an estate is not subject to the provisions of this paragraph.

(c) *Quantities.*—Generally, each person arriving in the United States may apply the exemption to one article of the type bearing a protected trademark. The Commissioner shall determine if a quantity of an article in excess of one may be entered and, with the approval of the Secretary of the Treasury, publish in the Federal Register a list of types of articles and the quantities of each entitled to the exemption. If the holder of a protected trademark allows importation of a quantity in excess of one of its particular trademarked article, the total of those trademarked articles authorized by the trademark holder may be entered without penalty.

2. The title to subpart I is amended to read "Subpart I—Personnel of Foreign Governments and International Organizations and Special Treatment for Returning Individuals".

3. The first sentence of section 148.90(d)(3) is amended to read as follows:

§ 148.90 Foreign military personnel.

* * * * * * *

(d) *Alcoholic beverages for personal or family use.*

* * * * * * *

(3) *Retention and verification of the warehouse proprietor's records.*— The warehouse proprietor shall retain all records relating to the entry and withdrawal of alcoholic beverages under item 822.20, Tariff Schedules of the United States (19 U.S.C. 1202), for 3 years from the date of the entry against which the withdrawal of the alcoholic beverages is charged.

* * * * * * *

(R.S. 251, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624).)

PART 151—EXAMINATION, SAMPLING, AND TESTING OF MERCHANDISE

A fifth sentence is added to section 151.44(a) to read as follows:

§ 151.44 Storage tanks.

(a) *Plans and gage tables.*

* * * The storage tank proprietor shall maintain the plans and gage tables for 3 years after discontinuing use of the storage tanks as bonded warehouses for the storage of imported petroleum products.

(R.S. 251, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624))

PART 162—INSPECTION, SEARCH, AND SEIZURE

1. The title to part 162 is amended to read "Part 162—Recordkeeping, Inspection, Search, and Seizure".

2. Section 162.0 is amended by deleting the first sentence and inserting the following two sentences in lieu thereof:

§ 162.0 Scope.

This part sets forth the recordkeeping requirements and procedures governing the examination of records and persons in connection with any audit or other inquiry or investigation conducted for the purpose of ascertaining the correctness of any entry, for determining the liability of any person for duties and taxes due or which may be due, for determining liability for fines, penalties, and forfeitures, or for insuring compliance with the laws and regulations administered by Customs. It also contains provisions for the inspection, examination, and search of persons, vessels, aircraft, vehicles, and merchandise

involved in importation, for the seizure of property, and for the forfeiture and sale of seized property. * * *

3. Part 162 also is amended by deleting sections 162.1 and 162.2, by amending the title to subpart A to read "Subpart A—Recordkeeping, Inspection, Examination and Search", and by adding new sections 162.1a through 162.1i to read as follows:

§ 162.1 [Reserved]

§ 162.1a Definitions.

When used in §§ 162.1a through 162.1i, the following terms shall have the meaning indicated:

(a) *Records.*—"Records" means:

(1) Statements, declarations, books, papers, correspondence, accounts, technical data, automated record storage devices (e.g., magnetic discs and tapes), computer programs necessary to retrieve information in a useable form, and other documents which:

(i) Pertain to any importation, or to the information contained in the documents required by law or regulation under the Tariff Act of 1930, as amended, in connection with the entry of merchandise;

(ii) Are of the type normally kept in the ordinary course of business; and

(iii) Are sufficiently detailed:

(A) To establish the right to make entry,

(B) To establish the correctness of any entry,

(C) To determine the liability of any person for duties and taxes due, or which may be due, the United States,

(D) To determine the liability of any person for fines, penalties, and forfeitures, and

(E) To determine whether the person has complied with the laws and regulations administered by the Customs Service; and

(2) Any other documents required under laws or regulations administered by the Customs Service.

(b) *Third-party recordkeeper.*—"Third-party recordkeeper" means any Customs broker, attorney, or accountant.

(c) *Summons.*—"Summons" means any summons issued under this subpart which requires either the production of records or the giving of testimony, or both.

(d) *Technical data.*—"Technical data" includes records, diagrams, and other data with regard to a business or an engineering or exploration operation, whether conducted inside or outside the United States, and whether on paper, cards, photographs, blueprints, tapes, microfiche, film, or other media.

§ 162.1b Recordkeeping.

(a) *Who must keep records.*—Any owner, importer, consignee, or their agent who imports, or knowingly causes to be imported, any merchandise into the Customs territory of the United States, shall make and keep records as defined in § 162.1a(a).

(b) *Domestic transaction excluded.*—A person ordering merchandise from an importer in a domestic transaction does not knowingly cause merchandise to be imported and is not required to make and keep records unless:

(1) The terms and conditions of the importation are controlled by the person placing the order with the importer (e.g., the importer is not an independent contractor but the agent of the person placing the order); or

(2) Technical data, molds, equipment, other production assist ance, material, components, or parts are furnished by the person placing the order with the importer with knowledge that they will be used in the manufacture or production of the imported merchandise.

§ 162.1c Record retention period.

Unless a different period of time is provided elsewhere in this chapter with respect to a specific type of record, any record required or made under § 162.1b shall be kept for 5 years from the date of entry of the merchandise.

§ 162.1d Examination of records and witnesses.

(a) *Examination.*—During the course of any inquiry or investigation initiated:

(1) To determine the correctness of any entry, the liability of any person for duties and taxes due or which may be due, or any liability for fines, penalties, and forfeitures, or

(2) To insure compliance with the laws and regulations administered by the Customs Service,

any Customs officer, during normal business hours and, to the extent possible, at a time mutually convenient to the parties, may examine, or cause to be examined, any relevant records, statements, declarations, or other documents by providing the person with reasonable notice, either orally or in writing, which describes the records with reasonable specificity.

(b) *Summons.*—During the course of any inquiry or investigation initiated for the reasons set forth in paragraph (a) of this section, the Commissioner of Customs or his designee, but no designee of the Commissioner below the rank of district director (area director in region II)

or special agent in charge, upon reasonable notice, may issue a summons to:

(1) Any person who imported merchandise, or knowingly caused merchandise to be imported,

(2) Any officer, employee, or agent of a person who imported merchandise or knowingly caused merchandise to be imported,

(3) Any person having possession, custody, or care of records relating to importations, or

(4) Any other person deemed proper to either produce records or give testimony, or both.

(c) *Transcript of testimony under oath.*—Testimony of any person taken under paragraph (a) or (b) of this section may be taken under oath and when so taken shall be transcribed. When testimony is transcribed, a copy shall be made available on request to the witness unless for good cause shown the issuing officer determines under 5 U.S.C. 555 that a copy should not be provided. In that event, the witness shall be limited to inspection of the official transcript of the testimony. The testimony or transcript may be in the form of a written statement under oath provided by the person examined at the request of a Customs officer.

§ 162.1e Contents of summons.

(a) *Summons for person.*—Any summons issued under section 162.1d(b) to compel appearance shall state:

(1) The name, title, and telephone number of the Customs officer before whom the appearance shall take place;

(2) The address where the person shall appear, not to exceed 100 miles from the place where the summons was served;

(3) The time of appearance; and

(4) The name, address, and telephone number of the Customs officer issuing the summons.

(b) *Summons of records.*—If the summons requires the production of records, the summons, in addition to containing the information required by paragraph (a) of this section, shall describe the records with reasonable specificity.

§ 162.1f Service of summons.

(a) *Who may serve.*—Any Customs officer is authorized to serve a summons issued under this part.

(b) *Method of service*—(1) *Natural person.*—Service upon a natural person shall be made by personal delivery.

(2) *Corporation, partnership, or association.*—Service shall be made upon a domestic or foreign corporation, or upon a partnership or other unincorporated association which is subject to suit under a common

name, by delivery to an officer, managing or general agent, or any other agent authorized to receive service of process.

(c) *Certificate of service.*—On the hearing of an application for the enforcement of the summons, the certificate of service signed by the person serving the summons is prima facie evidence of the facts it states.

§ 162.1g Third-party recordkeeper.

(a) *Notice.*—Except as provided by paragraph (f) of this section, if a summons issued under § 162.1d to a third-party recordkeeper requires the production of records or testimony relating to import transactions of any person other than the person summoned, and the person is identified in the description of the records in the summons, notice of the summons shall be provided the person identified in the description of the records contained in the summons.

(b) *Time of notice.*—Notice of service of summons required by paragraph (a) of this section should be provided by the issuing officer immediately after service of summons is obtained under § 162.1f, but in no event shall notice be given less than 10 business days before the date set in the summons for the examination of records or persons.

(c) *Contents of notice.*—The issuing officer shall insure that any notice issued under this section includes a copy of the summons and contains the following information:

(1) That compliance with the summons may be stayed if written direction is given by the person receiving notice to the person summoned not to comply with the summons.

(2) That a copy of the direction not to comply and a copy of the summons shall be mailed by registered or certified mail to the person summoned at the addresses in the summons and to the issuing Customs officer.

(3) That the actions under paragraphs (c)(1) and (c)(2) of this section shall be accomplished not later than the day before the day fixed in the summons as the day upon which the records are to be examined or testimony given.

(d) *Service of notice.*—The issuing officer shall serve the notice required by paragraph (a) of this section in the same manner as is prescribed in § 162.1f for the service of a summons, or by certified or registered mail to the last known address of the person entitled to notice.

(e) *Examination precluded.*—If notice is required by this section, no records may be examined and no testimony may be taken before the date fixed in the summons as the date to examine the records or to take the testimony. If the owner, importer, consignee, or their agent, or any other person concerned issues a stay of the summons,

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no examination shall take place, and no testimony shall be taken, without the consent of the person staying compliance, or without an order issued by a U.S. district court.

(f) *Exceptions to notice.*—

(1) *Personnel liability for duties and taxes.*—This section does not apply to any summons served on the person, or any officer or employee of the person, with respect to whose liability for duties and taxes the summons is issued.

(2) *Verification.*—This section does not apply to any summons issued to determine whether or not records of the import transactions of an identified person have been made or kept.

(3) *Court order.*—Notice shall not be given if a U.S. district court determines, upon petition by the issuing Customs officer, that reasonable cause exists to believe giving notice may lead to an attempt:

(i) To conceal, destroy, or alter relevant records;

(ii) To prevent the communication of information from other persons through intimidation, bribery, or collusion; or

(iii) To flee to avoid prosecution, testifying, or production of records.

§ 162.1h Enforcement of summons.

Whenever any person does not comply with a summons issued under § 162.1d, the issuing officer may request the appropriate U.S. attorney to seek an order requiring compliance from the U.S. district court for the district in which the person is found or resides or is doing business.

§ 162.1i Failure to comply with court order.

(a) *Importations prohibited.*—If a person fails to comply with a court order enforcing the summons and is adjudged guilty of contempt, the Commissioner of Customs, with the approval of the Secretary of the Treasury, for so long as that person remains in contempt:

(1) May prohibit importation of merchandise by that person, directly or indirectly, or for that person's account, and

(2) May withhold delivery of merchandise imported by that person, directly or indirectly, or for that person's account.

(b) *Sale of merchandise.*—If any person remains in contempt for more than 1 year after the Commissioner issues instructions to withhold delivery, the merchandise shall be considered abandoned, and shall be sold at public auction or otherwise disposed of in accordance with subpart E of this part.

§ 162.2 [Reserved]

4. Section 162.46(a) is amended by deleting the period and adding

"or section 491(b), Tariff Act of 1930, as amended (19 U.S.C. 1491 (b))."

5. Section 162.46 is further amended by amending the section heading and by adding a new paragraph (e) to read as follows:

§ 162.46 Summary forfeiture where value not over $10,000; disposition of goods.

* * * * * * *

(e) *Disposition of distilled spirits, wines, and malt liquor.*—In addition to disposition by sale or destruction as provided for by this section, distilled spirits, wines, and malt liquor may be delivered:

(1) To any Government agency the Commissioner of Customs or his designee determines has a need for these articles for medical, scientific, and mechanical purposes, or for any other official purpose for which appropriated funds may be expended by a Government agency, or

(2) By gift to any charitable institution the Commissioner of Customs or his designee determines has a need for the articles for medical purposes.

(R.S. 251, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624).)

(T.D. 79-160)

Violations of the Customs and Navigation Laws—Customs Regulations Amended

Parts 4, 6, 10, 123, 162, 171, and 172, Customs Regulations, relating to fines, penalties, forfeitures, and liquidated damages for violations of the customs and navigation laws, amended

TITLE 19—CUSTOMS DUTIES

CHAPTER I—U.S. CUSTOMS SERVICE

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

PART 6—AIR COMMERCE REGULATIONS

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

PART 123—CUSTOMS RELATIONS WITH CANADA AND MEXICO

PART 162—INSPECTION, SEARCH, AND SEIZURE

PART 171—FINES, PENALTIES, AND FORFEITURES

PART 172—LIQUIDATED DAMAGES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: Public Law 95–410, the Customs Procedural Reform and Simplification Act of 1978, made numerous changes to laws enforced by the Customs Service. Some of the changes relate to fines, penalties, and forfeitures incurred for violations of customs and navigation laws concerning:

1. The transportation of merchandise by foreign or other nonentitled vessels in the coastwise trade;
2. Foreign repairs and equipment purchases by vessels and aircraft of the United States;
3. The lack of a manifest or a discrepancy in a manifest; and
4. The entry of merchandise by fraud or negligence.

Generally, the act changed the penalties provided, added new procedural rules to be followed at the administrative level, and provided for more extensive judicial review. This document amends the Customs Regulations to establish new procedures to reflect these changes.

EFFECTIVE DATE: June 4, 1979.

FOR FURTHER INFORMATION CONTACT: Aspects of penalties assessed under 19 U.S.C. 1592: Edward T. Rosse, Commercial Fraud and Negligence Penalties Branch, 202–566–8317. Aspects of other penalties: Kathryn C. Peterson, Miscellaneous Penalties Branch, 202–566–5746—U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Customs Procedural Reform and Simplification Act of 1978 (Public Law 95–410), approved October 3, 1978 (the act), made numerous amendments to statutes administered by Customs which relate to fines, penalties, forfeitures, and liquidated damages for violations of customs and navigation laws. Specifically, the act amended:

1. Section 27, Merchant Marine Act of 1920 (46 U.S.C. 883), relating to the transportation of merchandise by foreign or other nonentitled vessels in the coastwide trade;

2. Section 466, Tariff Act of 1930 (19 U.S.C. 1466), relating to foreign repairs and equipment purchases by vessels of the United States (the statute is applicable to U.S.-registered aircraft in accordance with section 6.7(d), Customs Regulations, as authorized by 19 U.S.C. 1644 and 49 U.S.C. 1509(c));

3. Section 584, Tariff Act of 1930 (19 U.S.C. 1584), relating to lack of a manifest or a discrepancy in a manifest; and

4. Section 592, Tariff Act of 1930 (19 U.S.C. 1592), relating to entry of merchandise by fraud or negligence.

To reflect these changes, on November 16, 1978, Customs published

a notice in the Federal Register (43 F.R. 53453), proposing amendments to parts 4, 6, 10, 123, 162, and 171, Customs Regulations (19 CFR parts 4, 6, 10, 123, 162, and 171). The proposed amendments provided procedures for assessing a monetary penalty as an alternative to forfeiture of merchandise for a violation of 46 U.S.C. 883. Procedures also were proposed for forfeiture of a monetary amount as an alternative to forfeiture of a vessel or aircraft for a violation of 19 U.S.C. 1466. Similarly, new maximum penalties and procedures were proposed for certain manifest violations under 19 U.S.C. 1584. Finally, new procedures were proposed for the imposition of a monetary penalty or, in limited circumstances, for the seizure of merchandise, for a violation of 19 U.S.C. 1592. A detailed description of the provisions of the act which amended the penalty provisions administered by Customs and the background and purpose of the proposed changes to the Customs Regulations are contained in the November 16, 1978, notice.

That notice invited interested persons to submit comments on the proposed amendments on or before December 18, 1978. Many comments were received. Consideration of these comments and further review of the act have resulted in a number of changes to the proposed amendments.

DISCUSSION OF MAJOR COMMENTS

Penalties under 46 U.S.C. 883 and 19 U.S.C. 1466 and 1584

1. One commenter urged revision of proposed section 162.72(a) to provide that seizure actions against vessels and aircraft under 19 U.S.C. 1466 and 1584 be limited to the same circumstances as seizures of merchandise under 19 U.S.C. 1592; i.e., insolvency, lack of jurisdiction, or if seizure is essential to protection of the revenue or to prevent the importation of prohibited or restricted merchandise. Another commenter requested that the regulations for the assessment of penalties for violations of 46 U.S.C. 883 and 19 U.S.C. 1466 set forth maximum penalty levels based on the culpability of the violator, similar to the manner in which maximum penalties are determined for violations of 19 U.S.C. 1592.

These suggestions are not being adopted at this time because although the act contains new provisions for monetary penalties and procedures under 46 U.S.C. 883 and 19 U.S.C. 1466, it does not mandate that the standards for seizures and maximum penalties added to 19 U.S.C. 1592 be applied to violations of these statutes. However, the question of adding standards to the regulations applying to violations governed by these statutes will be considered by Customs in the future.

2. A commenter referred to Customs policy, stated in connection with proposed section 162.72(b), that a penalty would not be assessed against a carrier under 19 U.S.C. 1584 if the record clearly shows that

the unmanifested or falsely manifested cargo was packaged in such a way that the carrier's employees were prevented from knowing its contents. The commenter urged that this principle, as well as the specific criteria and procedures for determining liability, be set forth in the regulations. The commenter also requested that the regulations state that this principle would be applied to manifest irregularities involving loose cargo so that a carrier would not be liable if the record showed that the discrepancy occurred after the cargo left the carrier's custody. The same commenter requested that section 162.72(b) set forth the criteria and procedures for determining liability for discrepancies on manifests as between various persons handling imported goods, such as the importing and domestic carriers, and also the types of records which would suffice for proof that the carrier was not responsible for the discrepancy in the manifest. The commenter argued that Customs should not issue a penalty claim under 19 U.S.C. 1466 or 1584 in any circumstances which would require retention of records by air cargo carriers for more than 2 years.

While Customs will consider in the future the feasibility and desirability of publishing some general criteria used in determining liability under this section, adoption of regulations delineating the specific circumstances and factual situations in which carriers may be liable for manifest violations is considered impracticable at this time. In questionable cases, the carrier may contact Customs directly for guidance in establishing procedures which comply with the manifest requirements.

It also is considered impracticable to provide by regulation that the keeping of certain records by carriers would preclude the assessment of a penalty under 19 U.S.C. 1584. Further, the suggestion that a limit of 2 years should apply to the retention of records by carriers would be inconsistent with the provisions of 19 U.S.C. 1621 under which an action may be commenced by the United States for a violation of 19 U.S.C. 1466 or 1584 at any time up to 5 years after the time the alleged offense was discovered. Accordingly, these suggestions have not been adopted.

3. One commenter noted that the penalty prescribed in proposed section 162.72(b)(3) for manifest violations (overages) applicable to aircraft arrivals under 19 U.S.C. 1584 appears to be an exception to the general penalty provisions for entry and clearance and Customs violations applicable to aircraft under 49 U.S.C. 1474. The latter statute is implemented by section 6.11, Customs Regulations (19 CFR 6.11).

As amended by Public Law 95–410, 19 U.S.C. 1584 provides for a penalty equal to the value of the merchandise, but not to exceed $10,000, in the case of a vessel manifest discrepancy resulting in an

overage. Under 49 U.S.C. 1509 (b) and (c), the Secretary of the Treasury is authorized by regulation to provide for the application to civil aircraft of the laws and regulations relating to the administration of the Customs laws and the entry and clearance of vessels. Section 6.7, Customs Regulations (19 CFR 6.7), establishes manifest requirements applicable to aircraft and describes the procedures to be followed in the event of shortages, overages, or other manifest discrepancies. 49 U.S.C. 1474 provides that any person who violates any entry or clearance or Customs Regulation prescribed under 49 U.S.C. 1509 (b) or (c) shall be subject to a penalty of $500.

Customs is of the opinion that 19 U.S.C. 1431(b) would permit the assessment of penalties under either 19 U.S.C. 1584 or 49 U.S.C. 1474. However, 49 U.S.C. 1474, in prescribing a penalty of $500 for any violation of vessel entry or clearance laws or regulations made applicable to civil aircraft, is used presently rather than the provision of 19 U.S.C. 1584. The Customs Service believes that this practice should be continued. Accordingly, the word "aircraft" is being deleted from proposed section 162.72(b)(3), and a new sentence is being added to that section to distinguish the penalties applicable to vessels and vehicles for a violation of 19 U.S.C. 1584, involving a manifest discrepancy resulting in an overage, from the $500 penalty applicable to a similar violation by aircraft.

In addition, section 6.7(h)(5), Customs Regulations (19 CFR 6.7 (h)(5)), the subject of a proposed conforming amendment, is being amended further (1) to provide that any penalty assessed under 19 U.S.C. 1584 for a manifest discrepancy by an aircraft resulting in an overage shall be $500, and (2) to delete the sentence relating to the procedure for determining the value of merchandise seized for a violation of 19 U.S.C. 1584 which is not applicable to aircraft.

4. One commenter suggested that the prepenalty notice procedure under 19 U.S.C. 1584 applicable to violations occurring after October 3, 1978, the effective date of the act, also should be applicable to any violation which occurred before October 3, 1978, if a proceeding was not initiated until after that date.

Customs does not believe that any useful purpose would be served by issuing retroactive prepenalty notices for violations of the statute occurring before October 3, 1978. Only the master, aircraft commander, or the vessel or aircraft owner, was liable for manifest violations occurring before that date. Accordingly, for these violations, one of the principal purposes of the new prepenalty procedure, i.e., to determine the identity of the person actually responsible for the violation, would not apply.

5. Another commenter observed that in section 109(4) of the act, Congress used specific language in defining "clerical error" for the

purpose of exempting certain manifest violations under 19 U.S.C. 1584 from liability for penalties. The commenter contends that the definition of "clerical error" in proposed section 162.71(c) therefore is incorrect because it may be construed as limiting the kinds of discrepancies which Congress intended to exempt from liability.

The commenter's concern that the proposed regulatory definition will narrow the statutory definition of "clerical error" is unfounded. The language in the proposed regulation only clarifies the statutory definition and does not restrict it.

PENTALTIES ASSESSED UNDER 19 U.S.C. 1592

Definitions

1. A commenter requested that proposed section 162.71 be expanded to include definitions of the terms "negligence", "gross negligence", and "intentional" as used in the statute and the proposed regulations.

Except for section 110(f)(1)(B) of the act, and proposed section 162.70(b), Customs Regulations, which provide alternative effective dates for the provisions of the act relating to "any alleged intentional violation" of 19 U.S.C. 1592 involving Japanese television receivers the subject of antidumping proceedings, the statute and the proposed regulations refer to "fraud" and "fraudulent violation" rather than "intentional violation". However, the terms "negligence", "gross negligence", "fraud", "fraudulent violation", and "intentional violation" are not defined in the act. Accordingly, in proceedings under section 1592, these terms must be applied on a case-by-case basis, taking into account the facts and circumstances of each case, the purpose of the act, and prior administrative and judicial interpretations. In these circumstances, it has been concluded that it would be impossible at this time for Customs to incorporate in the regulations definitions of these terms which could be relied upon by persons subject to the statute. The feasibility and desirability of doing this in the future will be considered.

2. A commenter suggested that the definition of "actual loss of duties" in proposed section 162.71 be expanded to provide that, for purposes of assessing any penalty, the actual loss of duties shall be reduced by the amount of any erroneous overpayment of duties by the alleged violator.

As stated in proposed section 162.71(a)(1), the term "actual loss of duties" refers to the duties which the Government is deprived of by a violation in respect of a liquidated entry. If, in fact, there has been an erroneous overpayment of duties on a liquidated entry, there would be no actual loss of duties for that entry. Customs does not believe, however, that the act may be construed as contemplating any reduction in the actual loss of duties on an entry because the violator

may have made an erroneous overpayment of duties on other entries. Accordingly, this suggestion has not been adopted.

3. One commenter asked clarification regarding whether the word "duties" in the term "loss of duties", as defined in proposed section 162.71, includes internal revenue taxes which attach upon importation.

The word "duties" as used in the Customs Regulations is defined in section 101.1(i) (19 CFR 101.1(i)) to mean "Customs duties and any internal revenue taxes which attach upon importation". Accordingly, the word "duties" used in the terms "loss of duties", "actual loss of duties", and "potential loss of duties", as defined in proposed section 162.71, includes internal revenue taxes which attach upon importation.

4. Another commenter urged amendment of the definition of the term "mistake of fact" in proposed section 162.71(d) to indicate that an erroneous belief, even though it has legal consequences, is a mistake of fact unless it is caused by the neglect of a legal duty.

This suggestion has not been adopted because a mistake of fact relates only to an erroneous factual belief, whereas the language proposed by the commenter could be construed to mean that an erroneous belief concerning the legal consequence of the act is a mistake of fact.

5. One commenter requested that a definition of the term "customs broker" be added to proposed section 162.71 and that proposed section 162.73 be revised to set forth guidelines governing the assessment of penalties against customs brokers under 19 U.S.C. 1592.

The term "customhouse broker" is defined in section 111.1(b), Customs Regulations (19 CFR 111.1(b)). Customs believes that it would be inappropriate as well as impracticable to set forth in the regulations information relating to the liability of a particular class of persons and firms under 19 U.S.C. 1592. Accordingly, these suggestions are not being adopted. Individual brokers and brokerage firms may obtain advice on any particular aspect of their operations by direct inquiry to Customs. As in other areas, Customs will consider the feasibility and desirability of publishing some guidelines in the future.

SEIZURES

1. Two commenters urged that proposed section 162.21(a), which states the general seizure authority of Customs officers, should be expanded to set forth specific circumstances under which seizures are authorized or, alternatively, the statutory provisions authorizing seizure should be enumerated. One commenter suggested that the restrictions on seizures enacted in 19 U.S.C. 1592(c)(5) should be set forth in proposed section 162.21(a).

Proposed section 162.21(a) authorizes seizure of property by

Customs officers having a reasonable cause to believe that any law or regulation enforced by Customs has been violated. Because Customs enforces numerous laws and regulations, many on behalf of other agencies, it would be impracticable to set forth the specific circumstances under which siezures may be made or to enumerate all the various laws. In this regard, under section 162.31, Customs must provide information concerning the seizure, including the law violated, to any person from whom property is seized. Accordingly, these suggestions have not been adopted.

2. One commenter requested revision of proposed section 162.75(d)(1) to require that (i) district directors consider the degree of culpability and nature of the violation in determining the amount of security to be deposited to secure release of seized merchandise, and (ii) the security deposit be limited to an amount equal to the proposed monetary penalty.

Because of the necessity of investigating, verifying, and analyzing all pertinent information prior to any determination of the nature of the violation and culpability of the alleged violator in a seizure case, it would be impracticable to require that such a determination be made prior to release of the seized property. This suggestion, therefore, has not been adopted.

3. A commenter also requested that specific provisions be added to proposed 162.75(d)(2) for release of seized merchandise to persons acquiring an interest in the merchandise subsequent to its seizure by Customs.

This section provides that the district director may release seized merchandise to "any other person" than the person from whom the merchandise was seized, if the district director is satisfied that the person has a substantial interest in the merchandise and the person submits (i) an agreement to hold the United States and its officers and employees harmless, or (ii) a release from the person from whom the merchandise was seized. These provisions are considered to authorize the release of merchandise to a person who acquired an interest in the merchandise after seizure and, accordingly, Customs does not believe that more detailed procedures are required.

4. A commenter recommended the addition of a provision to proposed section 162.77(b)(1) to require that if a prepenalty notice is issued following a seizure, the notice shall include a statement of the grounds for the seizure, in addition to the classes of information required under the proposed regulations.

The provisions for a prepenalty notice in proposed section 162.77(b)(1) require that the person be furnished with information specified in 19 U.S.C. 1592(b)(1)(A) concerning the alleged violation and proposed penalty. Concerning the grounds for seizure, section

162.31, Customs Regulations (19 CFR 162.31), provides that following a seizure, the person from whom the property is seized shall be given a notice which sets forth all material information, including the grounds for the seizure. Accordingly, it is considered unnecessary that this information be repeated in the prepenalty notice.

PRIOR DISCLOSURE

1. Proposed section 162.74(d) would require that any person making a prior disclosure of a violation must establish lack of knowledge of any existing formal investigation of the violation by Customs. A commenter requested that this section include a provision that Customs must supply to the person any information in its possession which would tend to establish that the person had knowledge of an investigation, and that the person then be afforded a reasonable opportunity to refute the information.

This request is considered to be inconsistent with 19 U.S.C. 1592(c)(4), which expressly provides that the person asserting lack of knowledge of the commencement of a formal investigation has the burden of proof in establishing such lack of knowledge. If Customs does not agree that a valid prior disclosure has been made and the issue is raised in petition for relief, the person of course will be provided with Customs findings of fact and conclusions of law concerning lack of knowledge. For these reasons, this suggestion has not been adopted.

2. Two commenters recommended that proposed section 162.74(g) be revised to increase the amount of loss of duties to the Government which would warrant investigation and a penalty for a violation which is subject to a prior disclosure. The commenters suggested that the amount be increased from $250 to $500.

This recommendation has been adopted. Proposed section 162.74(g) has been revised further to provide that if the violation involves a loss of duties of $500 or less, the district director shall not refer the matter for investigation or establish a penalty case unless there is evidence of fraud.

3. Commenters also requested that the time period provided in proposed sections 162.76, 162.77, and 162.78, during which persons may make presentations in response to a prepenalty or penalty notice, should be 60 rather than 30 days. Further, it was contended that when a shorter time period is required because less than 1 year remains before the statute of limitations may be asserted as a defense (section 162.78), the shorter period should not be less than 14 days, rather than 7 days, and the date on which any shorter period shall commence should be the date on which the notice was received by the person, rather than the date on which the notice was mailed by Customs.

Customs considers that the 30-day period for responding to the

prepenalty notice is ample in most cases. If at least 1 year remains before the statute of limitations may be asserted as a defense, a district director may extend the time for preparation of a response for any of the reasons stated in section 162.32(a), such as the unavailability of evidence or testimony, or the complexity of legal or factual issues involved.

In cases where less than 1 year remains before the statute of limitations may be asserted, the 7-day period is a minimal time for response, and a district director may provide a longer period if the delay will not prejudice the Government's ability to enforce the claim.

Customs considers it essential to the enforcement of this provision that the period for response commence with the mailing of the notice. However, to improve this situation, section 162.78(a) has been revised to provide that if less than a 30-day period is allowed for response, the district director shall notify the person of the issuance and contents of the prepenalty notice by telephone, if possible.

PENALTY ASSESSMENT PROCEDURES

1. One commenter requested that proposed section 162.73 be revised to require that before issuing a prepenalty notice, the appropriate Customs officer examine the circumstances surrounding the alleged offense to determine whether the proposed claim should be in an amount less than the maximum penalty amount provided by 19 U.S.C. 1592.

This request has not been adopted because at the time a prepenalty notice must be issued, the district director ordinarily will not have received all of the information necessary to determine whether a claim should be assessed for less than the maximum amount. Of course, a person receiving a prepenalty notice will have an opportunity to present information concerning the amount of any penalty at the time he responds to the notice and before the penalty is assessed.

2. A commenter requested revision of proposed section 162.73(c) to specify that repetition of the same mistake of fact or clerical error, standing alone, would not be held to constitute a pattern of negligent conduct.

Customs considers that adoption of this suggestion would be inappropriate because repeated mistakes or errors do tend to indicate a lack of due care. Of course, the person would have the opportunity to show that the mistakes or errors occurred despite the use of due care.

3. A commenter requested revision of proposed section 162.79 to include a definition of what constitutes prompt notice by the district director of the determination whether a penalty is being assessed in a particular case. It also was requested that any penalty notice state

the reasons why arguments in response to the prepenalty notice were not accepted.

Differences in the complexity of penalty cases make it impracticable for the district director to issue a penalty notice in each case within a specified period. Under proposed section 162.79, the district director is required to issue a penalty notice "promptly," given the circumstances of each case. Any written response by the district director to the arguments made in response to the prepenalty notice would be premature in view of the requirement that the person to whom the penalty notice is issued may file a petition for relief and must be provided a written decision on the petition. Accordingly, these suggestions have not been adopted.

4. A commenter suggested that the provisions in proposed section 162.79b for recovery of the actual loss of duties (withheld duties) should be expanded to set forth more specifically the procedures for deposit of withheld duties.

These provisions implement new 19 U.S.C. 1592(d). Section 1592(d) provides that notwithstanding section 514 of the Tariff Act of 1930, as amended (19 U.S.C. 1514), if the United States has been deprived of lawful duties as a result of a violation of section 1592(a), the appropriate Customs officer shall require that duties be restored, whether or not a monetary penalty is assessed. To state more specifically the procedures for collection of withheld duties under section 162.79b, a provision has been added to section 162.79(b)(2) for payment of withheld duties by a person to whom a penalty notice has been issued. The provision requires that the person deposit or arrange for payment of withheld duties within 30 days of the date of the penalty notice. Similarly, section 162.79b has been revised to provide that if payment of withheld duties is being required from a person to whom a penalty notice is not issued, the district director shall issue a notice of withheld duties to the person concerned. The notice shall contain generally the information which would be included in a penalty notice. The person will be required to deposit or arrange for payment of the withheld duties within 30 days of the date of the mailing of the notice. Any determination by a district director to require a deposit of withheld duties will be subject to review by Customs headquarters.

PETITIONS FOR RELIEF

1. Commenters urged that decisions of the district director on petitions for relief under section 171.21 should be made subject to review by the regional commissioner or by Customs headquarters, prior to issuance. As an alternative, it was suggested that the maximum claim which the district director is authorized to mitigate or remit in response to a petition for relief be reduced from $25,000 to $10,000.

These suggestions have not been adopted because they are in-

consistent with Customs policy to delegate authority to the level at which it can be most effectively exercised. To limit the authority of field officers to act on petitions for relief as suggested would hamper Customs efforts to promote the prompt disposition of penalties cases.

Existing procedures for review of initial and supplemental petitions for relief contained in subparts C and D of part 171, Customs Regulations, provide adequate means for review of initial determinations by district directors on petitions for relief from penalty claims. The administrative processing of penalty assessments and decisions on petitions for relief under 19 U.S.C. 1592 will be monitored carefully by Customs headquarters to insure that the assessments and decisions are uniform and reached in a timely manner.

2. A commenter requested that proposed section 171.31 be expanded to indicate the procedure for the dissemination to the general importing public of Customs decisions on petitions for relief.

Decisions on initial and supplemental petitions considered to be precedential in nature or otherwise significant will be published in the weekly CUSTOMS BULLETIN with appropriate deletion of information exempt from disclosure under part 103 of this chapter. This provision has been added to section 171.31.

ADDITIONAL CHANGES

As a result of a further review by Customs of existing and proposed procedures in the areas of fines, penalties, forfeitures, and liquidated damages, the following amendments to the Customs Regulations, although not referred to in the November 16, 1978, notice of proposed rulemaking, have been found to be necessary to implement Public Law 95–410.

1. Public Law 95–410 amended 19 U.S.C. 1621 to provide that in cases of alleged violations of 19 U.S.C. 1592 arising out of gross negligence or negligence, the statute of limitations may be asserted as a defense in any action brought by the Government more than 5 years after the date the alleged violation was committed. Formerly, the statute of limitations could be asserted as a defense in those cases only if the action was brought more than 5 years after the date of discovery by Customs of the alleged violation. In view of this new provision, section 162.32(a), Customs Regulations, has been amended to provide that if a penalty is assessed alleging a violation of 19 U.S.C. 1592, and fewer than 180 days remain from the date of the penalty notice before the statute of limitations may be asserted as a defense, the district director may specify in the notice a reasonable period shorter than 60 days, but not less than 7 days, for filing a petition for relief.

2. Under 19 U.S.C. 1613, a person claiming an interest in property which has been forfeited and sold for a violation of the Customs laws

may apply to the Secretary of the Treasury for remission of the forfeiture and restoration of the proceeds of sale. The application must demonstrate a lack of awareness by the person of the forfeiture proceeding and that the forfeiture was incurred without willful negligence or intent to defraud. The statute sets forth the costs to be deducted in determining the net proceeds available to the person. Provisions for the distribution of restored proceeds to successful applicants currently are set forth in section 162.51, Customs Regulations.

The act further amended section 613, Tariff Act of 1930, as amended (19 U.S.C. 1613), by redesignating its present provisions as section 613(a) and by adding a new section 613(b). This new section provides that if the proceeds of sale of merchandise forfeited under 19 U.S.C. 1592 exceed the sum of (i) the monetary penalty finally assessed and (ii) the expenses incurred in forfeiture and sale as referred to in section 613(a), the excess proceeds shall be refunded to the person against whom the penalty was assessed. Accordingly, part 162, Customs Regulations, has been amended by adding a new section 162.52 to provide for the refund of any excess proceeds from the sale of merchandise seized and forfeited under 19 U.S.C. 1592, Section 162.52 also includes a listing of the order in which expenses and charges related to forfeiture and sale for violations of 19 U.S.C. 1592 shall be paid out of the proceeds of sale. Similarly, section 162.51 has been amended to provide that expenses and charges shall be paid out of the proceeds of sale in the same order as set out in section 162.52 before refunds can be made.

3. Section 6.11 is amended to make clear that as an alternative to seizure and forfeiture of the aircraft, the owner of any aircraft in violation of section 466, Tariff Act of 1930, as amended (see sec. 6.7(d)), shall be liable for seizure and forfeiture of a monetary amount up to the value of the aircraft in addition to the civil penalty of $500 provided by section 6.11 for any violation of a Customs requirement prescribed in 19 CFR part 6.

4. Section 162.31, Customs Regulations, provides that written notice of any fine, penalty, or liability to forfeiture incurred under the laws administered by Customs shall be given to each person the facts of record indicate has an interest in the claim or seized property. The notice must inform each interested person of the provisions concerning the filing of petitions for relief from the claim or forfeiture in part 171.

In a recent decision, the Ninth Circuit Court of Appeals stated that the filing of a petition for relief from a forfeiture does not of itself excuse the Government from its obligation to commence prompt judicial proceedings, although the parties may agree that judicial action shall be postponed until the conclusion of the administrative

action on the petition for relief (*Ivers* v. *United States*, 581 F. 2d, 1362 (9th Cir. 1978)). In view of this decision, section 162.31(a) is amended to provide notice that petitioners must file an express agreement to defer judicial or administrative forfeiture action pending resolution of the administrative consideration of the petition. In the absence of auch an agreement, cases involving seizures will be referred immediately to the U.S. attorney for the commencement of forfeiture proceedings, or the seized property will be forfeited summarily in accordance with the provisions of subpart E, part 162 of this chapter. Reference to this procedural requirement also is being added to section 171.11(d).

5. Section 162.41(c)(1), Customs Regulations, provides that a Customs entry which is the subject of an investigation or penalty action under 19 U.S.C. 1592 may be liquidated by the district director prior to the conclusion of the investigation or final disposition of the forfeiture proceedings or claim for forfeiture value if the district director determines that liquidation would be in the best interest of the Government.

Public Law 95–410 added a new section 504 to the Tariff Act of 1930, as amended (19 U.S.C. 1504), to provide that an entry not liquidated within 1 year from the date of entry or final withdrawal of all merchandise covered by a warehouse entry shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted by the importer, consignee, or his agent at the time of entry. The period for liquidation may be extended or suspended, however, upon notice to the importer, consignee or his agent, and surety if (1) information needed for the proper appraisement or classification of the merchandise is not available to Customs, or (2) the importer, consignee, or his agent requests an extension and shows good cause therefor, or (3) liquidation is suspended as required by statute or court order. Any entry not liquidated after 4 years shall be deemed liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry unless liquidation continues to be suspended by statute or court order, in which event the entry shall be liquidated within 90 days after removal of the suspension.

Accordingly, section 162.41(c) is being amended by redesignating paragraph (c)(1) as (c)(1)(i) and by adding a new paragraph (c)(1)(ii) to refer to the provisions of new section 504 of the Tariff Act. A provision has been added to redesignated paragraph (c)(1)(i) to provide that the district director's discretionary authority to liquidate during the pendency of a penalty proceeding shall be subject to the provisions of new paragraph (c)(1)(ii).

In addition, "penalty action" has been substituted for "forefeiture proceedings or claim for forefeiture value" in redesignated paragraph

(c)(1)(i). Also, a period has been placed after "merchandise" and "in addition to the seizure of the merchandise or demand for forfeiture value." has been deleted in paragraph (c)(2). These revisions reflect the amendment of 19 U.S.C. 1592 by Public Law 95–410 to provide for imposing a monetary penalty in addition to forefeiture and in lieu of a claim for forefeiture value and restricting the circumstances under which seizure and forefeiture may take place for violations of 19 U.S.C. 1592.

EDITORIAL CHANGES

1. The words "at the time of discovery of the violation" have been deleted from proposed sections 162.71(a) (1) and (2), because an actual loss of revenue may result after discovery of a violation. In many cases, the violation involves numerous entries at various ports, and liquidation often becomes final through inadvertence or otherwise after discovery of the violation.

2. The word "actual" has been inserted before "loss" where the term "loss of duties" is used in proposed section 162.74(a) and in the heading and the first sentence of proposed section 162.74(e) to clarify that the required tender of duties applies only to the actual loss of duties.

3. The language after "in the discretion of" in proposed section 171.14(b), has been deleted and the following is substituted:

> * * * any official of the Customs Service or Department of the Treasury authorized to act on a petition or supplemental petition.

This change has been made because various officials within Customs and the Treasury Department other than those specifically enumerated in the proposed section are authorized to act on petitions and supplemental petitions.

4. A reference to a claim for a "monetary amount" is being added in sections 162.72 and 162.76 to reflect the alternative to forfeiture of the vessel provided for in section 466, Tariff Act of 1930, as amended by the act (applied to aircraft by section 6.7(d), Customs Regulations). A conforming change is being made in proposed section 4.80(b)(1).

5. The words "together with a copy of 19 U.S.C. 1584" are deleted from section 162.65(c) to reflect the current practice of Customs to refer to the law violated in the seizure notice rather than to attach a separate copy of the statute itself.

6. Reference to collection action required by the Federal Claims Collection Act of 1966 (31 U.S.C. 951–953) in respect of a penalty or claim for monetary penalty prior to referral of the matter to the

U.S. attorney is being added to sections 162.32(a), 162.41(b), 162.65(d), 171.32, 172.2(a), and 172.32.

After consideration of all comments received and further review of the proposed amendments, it has been determined that the amendments should be adopted as proposed, except for the changes described.

INAPPLICABILITY OF EXECUTIVE ORDER 12044

This document is not subject to the provisions of the Treasury Department directive (43 F.R. 52120) implementing Executive Order 12044, Improving Government Regulations, because the document was in the process of preparation before May 22, 1978.

DRAFTING INFORMATION

The principal author of this document was Edward T. Rosse, Regulations and Legal Publications Division, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

AMENDMENTS TO THE REGULATIONS

Parts 4, 6, 10, 123, 162, 171, and 172, Customs Regulations (19 CFR Parts 4, 6, 10, 123, 162, 171, and 172), are amended as set forth below.

R. E. CHASEN,
Commissioner of Customs.

Approved: May 23, 1979.

RICHARD J. DAVIS,
Assistant Secretary of the Treasury.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. Footnote 23 to section 4.12 is amended to read as follows:

§ 4.12 Explanation of manifest discrepancy.

* * * * * * *

[23] * * * "if any merchandise described in such manifest is not found on board the vessel or vehicle the master or other person in charge or the owner of such vessel or vehicle or any person directly or indirectly responsible for any discrepancy between the merchandise and said manifest shall be subject to a penalty of $500: *Provided,* That if the appropriate Customs officer shall be satisfied that the manifest * * * is incorrect by reason of clerical error or other mistake and that no part of the merchandise not found on board was unshipped or discharged except as specified in the report of the master, said penalties shall not be incurred. * * *, the term 'clerical error' means a nonnegligent inadvertent or typographical mistake in the preparation, assembly, or submission of the manifest. * * * "

(Sec. 584, Tariff Act of 1930, as amended; 19 U.S.C. 1584.)

2. The second sentence of section 4.12(a)(5) is amended to read as follows:

(a) * * *

(5) * * * For purposes of this section, the term "clerical error" is defined as a nonnegligent, inadvertent, or typographical mistake in the preparation, assembly, or submission of the manifest. * * *

3. Section 4.80 is amended by redesignating present paragraphs (b), (c), (d), (e), (f), and (g) as (c), (d), (e), (f), (g), and (h), respectively, and by inserting a new paragraph (b) to read as follows:

§ 4.80 Vessels entitled to engage in coast-wise trade.

* * * * * * *

(b) *Penalties for violating coastwise laws.*

(1) The penalty imposed for the illegal transportation of merchandise between coastwise points is forfeiture of the merchandise or, in the discretion of the district director, forfeiture of a monetary amount up to the value of the merchandise to be recovered from the consignor, seller, owner, importer, consignee, agent, or other person or persons so transporting or causing the merchandise to be transported (46 U.S.C. 883).

(2) The penalty imposed for the unlawful transportation of passengers between coastwise points is $200 for each passenger so transported and landed (46 U.S.C. 289).

(R.S. 251, as amended, secs. 466, 584, 624, 46 Stat. 718, 748, 759 (19 U.S.C. 66, 1466, 1584, 1624), sec. 27, 41 Stat. 999, as amended (46 U.S.C. 883), and sec. 1109, 72 Stat. 799, as amended (49 U.S.C. 1509).)

PART 6—AIR COMMERCE REGULATIONS

Section 6.7(h)(5) is amended to read as follows:

§ 6.7 Documents for entry.

* * * * * * *

(h) * * *

(5) Unless the required notification and explanation are made timely and the district director is satisfied that the discrepancies resulted from clerical error or other mistake and that there has been no loss of revenue (and in the case of a discrepancy not initially reported by the aircraft commander or agent, that there was a valid reason for the failure to so report), applicable penalties under section 584, Tariff Act of 1930, as amended, shall be assessed, except that any penalty involving a manifest discrepancy resulting in an overage shall be $500 (see sec. 162.31 of this chapter). For purposes of this section, the term "clerical

error" is defined as a nonnegligent, inadvertent, or typographical mistake in the preparation, assembly, or submission of the manifest. However, repeated similar manifest discrepancies by the same parties may be deemed the result of negligence and not clerical error or other mistake. The fact that the aircraft commander or owner had no knowledge of a discrepency shall not relieve him from the penalty.

2. Section 6.11 is amended to read as follows:

§ 6.11 Penalties and forfeitures.

Any person violating any Customs requirement prescribed in this part, or any provision of the Customs laws or regulations made applicable to aircraft by section 6.10 shall be subject to a civil penalty of $500, and any aircraft used in connection with any such violation shall be subject to seizure and forfeiture, as provided for in the customs laws. As an alternative to seizure and forefiture of the aircraft, the owner of any aircraft in violation of section 466, Tariff Act of 1930, as amended (see sec. 6.7(d)), shall be liable for seizure and forfeiture of a monetary amount up to the value of the aircraft in addition to the civil penalty of $500. The penalty and forfeitures may be remitted or mitigated in accordance with the provisions of part 171 of this chapter.

(R.S. 251, as amended, 624, 46 Stat. 759, 92 Stat. 901 (19 U.S.C. 66, 1466, 1624); sec. 904, 1109, 72 Stat. 787, 799, as amended (49 U.S.C. 1474, 1509).)

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

The last sentence of section 10.41(d) is amended to read as follows:

§ 10.41 Instruments, exceptions.

* * * * * * *

(d) * * * The use of any such vehicle, aircraft, or boat without a proper entry having been made may result in liabilities being incurred under section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592).

(R.S. 251, as amended, 624, 592, 46 Stat. 750, as amended, 759 (19 U.S.C. 66 1592, 1624).)

PART 123—CUSTOMS RELATIONS WITH CANADA AND MEXICO

1. Section 123.12(c) is amended to read as follows:

§ 123.12 Entry of foreign locomotives and equipment in international traffic.

* * * * * * *

(c) *Penalty for improper use.*—The use of any foreign locomotive and other foreign railroad equipment in violation of this section may result in liabilities being incurred under section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592).

2. Section 123.14(d) is amended to read as follows:

§ 123.14 Entry of foreign-based trucks, buses, and taxicabs in international traffic.

* * * * * * *

(d) *Penalty for improper use.*—The use of any vehicle referred to in this section in violation of this section may result in liabilities being incurred under section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592).

(R.S. 251, as amended, 624, 592, 46 Stat. 750, as amended, 759 (19 U.S.C. 66, 1592, 1624).)

PART 162—INSPECTION, SEARCH, AND SEIZURE

1. Section 162.21(a) is amended to read as follows:

§ 162.21 Responsibility and authority for seizures.

(a) *Seizures by Customs officers.*—Property may be seized, if available, by any Customs officer who has reasonable cause to believe that any law or regulation enforced by the Customs Service has been violated, by reason of which the property has become subject to seizure or forfeiture. This paragraph does not authorize seizure when seizure or forfeiture is restricted by law or regulation (see, for example, § 162.75), nor does it authorize a remedy other than seizure when seizure or forfeiture is required by law or regulation. A receipt for seized property shall be given at the time of seizure to the person from whom the property is seized.

2. Section 162.31(a) is amended by adding the following at the end thereof:

* * * The notice shall inform any interested party in a case involving forfeiture of seized property that unless the petitioner provides an express agreement to defer judicial or administrative forfeiture proceedings until completion of the administrative process, the case will be referred promptly to the U.S. attorney for institution of judicial proceedings, or summary forfeiture proceedings will be begun.

3. Section 162.32(a) is amended by revising the first sentence and by adding a new sentence between the first and second sentences to read as follows:

§ 162.32 Where petition for relief not filed.

(a) *Fines, penalties, and forfeitures.*—If any person who is liable for

a fine, penalty, or claim for a monetary amount, or who has an interest in property subject to forfeiture, fails to petition for relief under part 171 of this chapter, or fails to pay or to arrange to pay the fine or penalty within 60 days from the mailing date of the violation notice provided in section 162.31 (unless additional time is authorized for filing a petition, as specified below), the district director, after required collection action, if appropriate, shall refer the case promptly to the U.S. attorney unless the Commissioner of Customs expressly authorizes other action. If a penalty is assessed under section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), and fewer than 180 days remain from the date of the penalty notice before the statute of limitations may be asserted as a defense, the district director may specify in the notice a reasonable period of time shorter than 60 days, but not less than 7 days, for the filing of a petition for relief. * * *

4. Section 162.32(b) is amended to read as follows:

(b) *Appraised value of seized property exceeds $10,000.*—If the appraised value of seized property exceeds $10,000 and neither a petition for relief in accordance with part 171 of this chapter, nor an offer to pay the domestic value as provided for in section 162.44, is made within 60 days (unless additional time has been authorized under section 162.32(a)), the district director shall refer the case promptly to the U.S. attorney for the judicial district in which the seizure was made.

5a. Section 162.41(b) is amended to read as follows:

(b) *Claim for domestic value unpaid.*—If a claim for domestic value made by the district director is not paid or settled as prescribed in this part or in part 171 of this chapter, the district director, after required collection action, shall refer the case promptly to the U.S. attorney.

5b. Section 162.41(c) is amended to read as follows:

(c) *Liability for duties; liquidation of entries.*—(1)(i) When an entry is the subject of an investigation for possible violation of section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), or of a penalty action established under that section, the district director, subject to the provisions of paragraph (c)(1)(ii) of this section, may liquidate the entry and collect duties before the conclusion of the investigation or final disposition of the penalty action if he determines that liquidation would be in the interest of the Government.

(ii)(A) An entry not liquidated within 1 year from the date of entry or final withdrawal of all merchandise covered by a warehouse entry shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer, his consignee, or agent, unless the time for liquidation is extended by the district director because—

(1) Information needed by Customs for the proper appraisement or classification of the merchandise is not available,

(2) The importer, his consignee, or agent requests an extension and demonstrates good cause why the extension should be granted, or

(3) The 1-year liquidation period is suspended as required by statute or court order.

(B) An entry not liquidated within 4 years from the date of entry or final withdrawal of all merchandise covered by a warehouse entry shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer, his consignee, or agent, unless liquidation continues to be suspended by statute or court order. In that event, the entry shall be liquidated within 90 days after removal of the suspension.

(C) The district director promptly shall notify the importer or consignee concerned and any authorized agent and surety of the importer or consignee in writing of any extension or suspension of the liquidation period.

(2) When merchandise not covered by an entry is subject to section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), a demand shall be made on the importer for payment of the duty estimated to be due on such merchandise.

(3) Any applicable internal revenue tax shall also be demanded unless the merchandise is to be, or has been, forfeited.

6. The first sentence of section 162.43(b) is amended to read as follows:

§ 162.43 Appraisement.

* * * * * * *

(b) *Property not under seizure.*—The basis for a claim for forfeiture value or for an assessment of a penalty relating to the forfeiture value of property not under seizure is the domestic value as defined in paragraph (a) of this section, except that the value shall be fixed as of the date of the violation. * * *

7. Section 162.51 is amended to read as follows:

§ 162.51 Disposition of proceeds of sale of property seized and forfeited other than under 19 U.S.C. 1592.

(a) *Order of payment of expenses incurred.*—

(1) *When application for remission and restoration is filed and approved.*—Section 613 of the Tariff Act of 1930, as amended (19 U.S.C. 1613), and section 171.41 of this chapter authorize the filing of an application for remission of the forfeiture and restoration of the proceeds from the sale of seized and forfeited property. If the application is filed within 3 months after the date of sale and is approved, the

the proceeds of the sale, or any part thereof, shall be restored to the applicant after deducting the following charges in the order named:

(i) Internal revenue taxes.

(ii) Marshal's fees and court costs.

(iii) Expenses of advertising and sale.

(iv) Expenses of cartage, storage, and labor. When the proceeds are insufficient to pay these expenses fully, they shall be paid pro rata.

(v) Duties.

(vi) Any sum due to satisfy a lien for freight, charges, or contributions in general average, provided notice of the lien has been given in the manner prescribed by law.

(2) *When no application for remission and restoration is filed or the application is denied.*—If no application for remission and restoration is filed within 3 months after the date of sale of seized and forfeited property, or if the application is denied, the proceeds of the sale shall be disbursed in the following order:

(i) Internal revenue taxes.

(ii) Marshal's fees and court costs.

(iii) Expenses of advertising and sale.

(iv) Expenses of cartage, storage, and labor, except that expenses for Government labor and storage on Government-owned or Government-leased property shall not be included. When the proceeds are insufficient to pay expenses of cartage, storage, and labor fully, they shall be paid pro rata.

(v) Any sum due to satisfy a lien for freight, charges, or contributions in general average, provided notice of the lien has been given in the manner prescribed by law.

(vi) The residue, if any, shall be deposited with the Treasurer of the United States as a customs or navigation fine.

(b) *Transfer of seized and forfeited property to another Federal agency.*—In the event that the seized and forfeited property has been authorized for transfer to another Federal agency for official use, the receiving agency shall reimburse Customs for the costs incurred in moving and storing the property from the date of seizure to the date of delivery.

8. Part 162 is amended by adding a new section 162.52 to read as follows:

§ 162.52 Disposition of proceeds of sale of property seized and forfeited under 19 U.S.C. 1592.

(a) *Order of disposition of proceeds.*—Section 613 of the Tariff Act of 1930, as amended (19 U.S.C. 1613), provides for the disposition of the proceeds from the sale of property seized and forfeited under section

592, Tariff Act of 1930, as amended (19 U.S.C. 1592), as provided for in section 162.75 of this part. Distribution shall be made in the following order:

(1) Internal revenue taxes.

(2) Marshal's fees and court costs.

(3) Expenses of advertising and sale.

(4) Expenses of cartage, storage, and labor. When proceeds are insufficient to pay these expenses fully, they shall be paid pro rata.

(5) Duties.

(6) Any sum due to satisfy a lien for freight, charges, or contributions in general average, provided notice of the lien has been given in the manner prescribed by law.

(7) The monetary penalty assessed under 19 U.S.C. 1592.

(8) The remaining proceeds, if any, shall be paid to the appropriate party-in-interest as provided in paragraph (b).

(b) *Determination of appropriate party-in-interest.*—

(1) If the property is subject to a judicial forfeiture proceeding and if it appears at the time of this proceeding that two or more parties claim an interest in the remaining proceeds referred to in section (a)(8), each of the parties shall be joined in the proceeding so that the issue of proper distribution may be determined by the court.

(2) If the property is sold under the summary forfeiture procedure, or if the court has not specified the manner of distribution, the district director shall hold the excess proceeds for 3 months from the date of the sale to allow any party-in-interest to claim the proceeds.

(3) If there is one alleged violator and no petition has been filed for the excess proceeds by another person, the excess proceeds shall be disbursed to the person against whom the penalty was assessed.

(4) If there are two or more persons with claims or possible claims to the excess proceeds, the district director shall attempt to obtain a written agreement from the parties as to the distribution. If an agreement cannot be reached, the matter shall be referred to Customs headquarters for determination.

(c) *Official use of seized and forfeited property.*—If the seized and forfeited property has been authorized for official use, its retention or delivery shall be regarded as a "sale" for the purposes of section 613, Tariff Act of 1930, as amended (19 U.S.C. 1613). The appropriation available to the receiving agency for the purchase, hire, operation, maintenance, and repair of the type of property involved shall be distributed as provided in paragraphs (a) and (b).

9. The first sentence of 162.65(c) is amended to read as follows:

§ 162.65 Penalties for failure to manifest narcotic drugs or marihuana.

* * * * * * *

(c) *Notice and demand for payment of penalty.*—A written notice and demand for payment of the penalty for failure to manifest incurred under section 584, Tariff Act of 1930, as amended (19 U.S.C. 1584), shall be sent to the master of the vessel, or commander of the aircraft, or the person in charge of the vehicle and to the owner of the vessel, aircraft, or vehicle, or any person directly or indirectly responsible.* * *

10. Section 162.65(d) is amended to read as follows:

(d) *Referral to the U.S. attorney.*—If the penalty incurred under section 584, Tariff Act of 1930, as amended, is not paid, or a petition is not filed as provided in part 171 of this chapter, or if payment is not made in accordance with the decision on a petition or a supplemental petition, the district director, after required collection action, shall refer the case to the U.S. attorney.

11. Part 162 is amended by adding a new subpart G to read as follows:

SUBPART G—SPECIAL PROCEDURES FOR CERTAIN VIOLATIONS

Sec.

SUBPART G—SPECIAL PROCEDURES FOR CERTAIN VIOLATIONS

§ 162.70 Applicability.

(a) The provisions of this subpart apply only to fines, penalties, or forfeitures incurred for the following violations of the customs laws:

(1) Violations of sections 466 and 584(a)(1), Tarriff Act of 1930, as amended (19 U.S.C. 1466, 1584(a)(1)), that occur after October, 3 1978, and

(2) Except as provided in paragraph (b) of this section, violations of section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), with

respect to which proceedings have commenced after December 31, 1978. For purposes of this subparagraph, a proceeding commences with the issuance of a prepenalty notice or, if no prepenalty notice is issued, with the issuance of a notice of a claim for a monetary penalty.

(b) The provisions of this subpart do not apply to alleged intentional violations of 19 U.S.C. 1592 if the alleged violation—

(1) Involves television receivers that are the products of Japan and were or are the subject of antidumping proceedings (see sec. 153.46 of this chapter),

(2) Occurred before October 3, 1978, and

(3) Was the subject of a Customs investigation begun before October 3, 1978.

(c) The provisions of subparts A through F of this part shall apply to the violations referred to in paragraph (a) of this section unless this subpart specifically provides otherwise.

§ 162.71 Definitions.

When used in this subpart, the following terms shall have the meanings indicated:

(a) *Loss of duties.*—"Loss of duties" means the duties of which the Government is or may be deprived by reason of the violation and includes both actual and potential loss of duties.

(1) *Actual loss of duties.*—"Actual loss of duties" means the duties of which the Government has been deprived by reason of the violation in respect of entries on which liquidation had become final.

(2) *Potential loss of duties.*—"Potential loss of duties" means the duties of which the Government tentatively was deprived by reason of the violation in respect of entries on which liquidation had not become final.

(b) *Noncommercial importation.*—"Noncommercial importation" means merchandise imported by a traveler for an individual's personal or household use, or as a gift, but not imported for sale or other commercial purposes.

(c) *Clerical error.*—"Clerical error" means an error in the preparation, assembly, or submission of a document which results when a person intends to do one thing but does something else. It includes, for example, errors in transcribing numbers, errors in arithmetic, and the failure to assemble all the documents in a record.

(d) *Mistake of fact.*—"Mistake of fact" means an action based upon a belief by a person that the material facts are other than they really are; it can be that a fact exists but is unknown to the person, or that he believes something is a fact when in reality it is not. An action is not a mistake of fact if the erroneous belief is caused by the neglect of a legal duty.

§ 162.72 Penalties and forfeitures under sections 466 and 584 (a)(1), Tariff Act of 1930, as amended.

(a) *Foreign repairs and equipment purchases; election to proceed.*—If the district director has reasonable cause to believe that a violation of section 466, Tariff Act of 1930, as amended (19 U.S.C. 1466), has occurred, he may elect to proceed against the vessel or aircraft, or against the violator for forfeiture of a monetary amount up to the domestic value of the vessel or aircraft.

(b) *Lack or manifest or discrepancy in manifest.*—The penalties for violation of section 584(a)(1), Tariff Act of 1930, as amended (19 U.S.C. 1584(a)(1)), are as follows:

(1) A penalty of $500 against the master of a vessel, the commander of an aircraft, or the person in charge of a vehicle bound to the United States who does not produce the manifest on demand.

(2) A penalty of $500 against the master of a vessel, the commander of an aircraft, the person in charge of a vehicle, or the owner of the vessel, aircraft, or vehicle, or any person directly or indirectly responsible for the discrepancy, if any merchandise described in the manifest is not found on board (a "shortage").

(3)(i) A penalty equal to the lesser of $10,000 or the domestic value of merchandise found on board of or after having been unladen from a vessel or vehicle, or

(ii) A penalty of $500 (see sec. 6.11, Customs Regulations) if merchandise is found on board of or after having been unladen from an aircraft—if the merchandise is not included or described in the manifest or does not agree with the manifest (an "overage").

(iii) Unmanifested merchandise belonging to or consigned to the master or crew of the vessel, the commander or crew of the aircraft, or to the owner or person in charge of the vehicle, also shall be subject to forfeiture.

The appropriate of these penalties may be assessed against the master or crew of the vessel, the commander or crew of the aircraft, the person in charge of the vehicle, the owner of the vessel, aircraft, or vehicle, or any person directly or indirectly responsible for the discrepancy.

(c) *Exception.*—There is no violation, and consequently no penalty incurred under paragraph (b), in the circumstances described in sections 4.12(a)(5) and 6.7(h)(5) of this chapter.

§ 162.73 Penalties under section 592, Tariff Act of 1930, as amended.

(a) *Maximum penalty without prior disclosure.*—If the person concerned has not made a prior disclosure as provided in section 162.74,

the monetary penalty under section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), shall not exceed:

(1) For fraudulent violations, the domestic value of the merchandise;

(2) For grossly negligent violations,

(i) The lesser of the domestic value of the merchandise or four times the loss of duties, or

(ii) If there is no loss of duties, 40 percent of the dutiable value of the merchandise; and

(3) For negligent violations, (i) The lesser of the domestic value of the merchandise or two times the loss of duties, or

(ii) If there is no loss of duties, 20 percent of the dutiable value of the merchandise.

(b) *Maximum penalty with prior disclosure.*—If the person concerned has made a prior disclosure, the monetary penalty shall not exceed:

(1) For fraudulent violations, (i) One time the loss of duties, or

(ii) If there is no loss of duties, 10 percent of the dutiable value of the merchandise; and

(2) For grossly negligent and negligent violations, the interest on any loss of duties. The interest shall be computed from the date of liquidation at the prevailing rate of interest applied under section 6621, Internal Revenue Code of 1954, as amended (26 U.S.C. 6621).

(c) *Exception; clerical error or mistake of fact.*—There is no violation and, consequently, no penalty incurred, if the falsity or omission is due soley to clerical error or mistake of fact, unless the error or mistake is part of a pattern of negligent conduct.

§ 162.74 Prior disclosure.

(a) *In general.*—A prior disclosure is made if the person concerned discloses the circumstances of a violation of section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), before, or withour knowledge of, the commencement of a formal investigation of that violation, and makes a tender of any actual loss of duties in accordance with paragraph (e) of this section. If a prior disclosure is made, the maximum penalties shall be as set forth in § 162.73(b).

(b) *Referral for investigation.*—Any disclosure of a violation shall be referred immediately by the district director to the appropriate field office of the Office of Investigations. Upon completion of its investigation, the field office immediately shall return the disclosure, together with its report, to the district director for appropriate action.

(c) *Commencement of formal investigation.*—A formal investigation of a violation is considered to be commenced:

(1) In the case of a referral by an import specialist or other Customs officer of a matter involving the disclosing party and the

disclosed information for investigation of a possible violation of 19 U.S.C. 1592, on the date the matter was referred to the Office of Investigations;

(2) In the case of referral by an import specialist or other Customs officer of a request for value, classification or other technical investigation, on the date recorded in writing by an investigating agent as the date on which he discovered facts and circumstances which caused him to believe that the possibility of a violation of 19 U.S.C. 1592 existed with respect to the disclosing party and the disclosed information;

(3) In the case of an investigation prompted by an individual other than a Customs officer with regard to the disclosing party and the disclosed information, on the date recorded on the Memorandum of Information Received, Customs form 4621, by the Office of Investigations as the date on which the information was received;

(4) In the case of an ongoing investigation of a possible violation of 19 U.S.C. 1592 not involving the disclosing party and the information disclosed, on the date recorded in writing by an investigating agent as the date on which he discovered facts and circumstances which caused him to believe that the possibility of a violation of 19 U.S.C. 1592 existed with respect to the disclosing party and the disclosed information;

(5) In the case of a general ongoing investigation of a specific class of goods or industry, on the date recorded by the Office of Investigations as the date on which it determined to direct its investigation specifically to the disclosing party and the disclosed information; and

(6) In all other cases, on the date recorded in a Report of Investigation, Customs form 23, as the date on which an investigator was assigned to investigate possible violations of 19 U.S.C. 1592 by the disclosing party with respect to the disclosed information.

(d) *Proof of lack of knowledge.*—A person who claims a lack of knowledge of the commencement of a formal investigation has the burden to prove that lack of knowledge.

(e) *Tender of actual loss of duties.*—A person who discloses the circumstances of the violation shall tender any actual loss of duties at the time of disclosure, or within 30 days after the district director notifies the person in writing of his calculation of the actual loss of duties. The district director may extend the period if he determines there is good cause to do so.

(f) *Undisclosed violations.*—Undisclosed violations discovered by Customs as the result of an investigation of a prior disclosure of another violation shall not be entitled to treatment under the prior disclosure provisions.

(g) *Minor violations.*—The district director shall not refer a disclosed violation for investigation or establish a penalty case if:

(1) The disclosed violation involves a loss of duties of $500 or less,

(2) Any actual loss of duties has been deposited,

(3) There is no evidence that the violation was fraudulent, and

(4) There are no other compelling reasons for a penalty proceeding, such as a history of similar violations.

§ 162.75 Seizures limited under section 592, Tariff Act of 1930, as amended.

(a) *When authorized.*—Merchandise may be seized for violation of section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592) only if the district director has reasonable cause to believe that a person has violated the statute and that

(1) The person is insolvent,

(2) The person is beyond the jurisdiction of the United States,

(3) Seizure otherwise is essential to protect the revenue, or

(4) Seizure is essential to prevent the introduction of prohibited or restricted merchandise into the Customs territory of the United States.

(b) *No seizure if prior disclosure.*—Under no circumstances shall merchandise be seized under the authority of 19 U.S.C. 1592 if there has been a prior disclosure of the violation. This paragraph does not limit seizures under the authority of any other applicable law or regulation.

(c) *Seizure notice.—If merchandise is seized, the district director* shall promptly issue a written notice of seizure to the person concerned and to any other person the facts of record indicate has an interest in the merchandise. The seizure notice shall contain the information required by § 162.31 and shall state why the seizure was necessary.

(d) *Release of seized merchandise.*

(1) *To person from whom seized.*—The district director shall return seized merchandise to the person from whom seized upon the deposit of security, in a form acceptable to the district director, equal to the maximum penalty which may be assessed, if the entry of the merchandise into the commerce of the United States is not prohibited or restricted.

(2) *To others.*—The district director may release seized merchandise to any other person upon the deposit of adequate security, in a form acceptable to the district director, if the entry of the merchandise into the commerce of the United States is not prohibited or restricted, and if:

(i) The district director is satisfied that the person has a substantial interest in the merchandise, and

(ii) The person submits either an agreement to hold the United

States and its officers and employees harmless, or a release from the owner and/or the person from whom the merchandise was seized.

(3) *Forfeiture.*—If neither a petition for relief is filed in accordance with part 171 of this chapter, nor the monetary penalty paid within the time provided by law, the district director immediately shall:

(1) Report the facts to the U.S. attorney for the judicial district in which the seizure was made, if the appraised value of the seized merchandise exceeds $10,000, or

(2) Proceed under the summary forfeiture provisions of Subpart E of this part, if the appraised value does not exceed $10,000.

§ 162.76 Prepenalty notice for violations of sections 466 or 584 (a)(1), Tariff Act of 1930, as amended.

(a) *When required.*—If the district director has reasonable cause to believe that a violation of section 466 or 584(a)(1). Tariff Act of 1930, as amended (19 U.S.C. 1466, 1584(a)(1)), has occurred and determines that further proceedings are warranted, he shall issue to the person concerned a written notice of his intent to issue a penalty claim or a claim of forfeiture, as appropriate.

(b) *Contents.*

(1) *Facts of violation.*—The prepenalty notice shall:

(i) Describe the merchandise, if applicable.

(ii) Set forth the details of the error in the manifest, if applicable.

(iii) Specify all laws and regulations allegedly violated.

(iv) Describe all material facts and circumstances which establish the alleged violation, and

(v) State the estimated loss of duties, if any, and taking into account all circumstances, the amount of the proposed penalty claim or claim of forfeiture, as appropriate.

(2) *Right to make presentation.*—The prepenalty notice also shall inform the person of his right to make a written and an oral presentation within 30 days of the mailing of the notice (or such shorter period as may be prescribed under Sec. 162.78) as to why a penalty claim or claim of forfeiture should not be issued or, if issued and it involves a monetary amount, why it should be in a lesser amount than proposed.

(c) *Exception.*—No prepenalty notice shall be issued if the proposed penalty for an alleged violation of 19 U.S.C. 158(a)(1) is $500 or less.

§ 162.77 Prepenalty notice for violations of section 592. Tariff Act of 1930, as amended.

(a) *When required.*—If the district director has reasonable cause to believe that a violation of section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), has occurred, and determines that further proceed-

ings are warranted, he shall issue to the person concerned a notice of his intent to issue a claim for a monetary penalty. The prepenalty notice shall be issued whether or not a seizure has been made.

(b) *Contents.*

(1) *Facts of violation.*—The prepenalty notice shall:

(i) Describe the merchandise,

(ii) Set forth the details of the entry or introduction, the attempted entry or introduction, or the aiding or abetting of the entry, introduction, or attempt,

(iii) Specify all laws and regulations allegedly violated.

(iv) Disclose all material facts which establish the alleged violation.

(v) State whether the alleged violation occurred as the result of fraud, gross negligence, or negligence, and

(vi) State the estimated loss of duties, if any, and, taking into account all circumstances, the amount of the proposed monetary penalty.

(2) *Right to make presentations.*—The prepenalty notice also shall inform the person of his right to make an oral and a written presentation within 30 days of the mailing of the notice (or such shorter period as may be prescribed under Sec. 162.78) as to why a claim for a monetary penalty should not be issued or, if issued, why it should be in a lesser amount than proposed.

(c) *Exceptions.*—A prepenalty notice shall not be issued if:

(1) The claim is for $1,000 or less, or

(2) The violation occurred with respect to a noncommercial importation.

§ 162.78 Presentations responding to prepenalty notice.

(a) *Time within which to respond.*—Unless a shorter period is specified in the prepenalty notice or an extension is given in accordance with paragraph (b) of this section, the named person shall have 30 days from the date of mailing of the prepenalty notice to make a written and an oral presentation. The district director may specify a shorter reasonable period of time, but not less than 7 days, if less than 1 year remains before the statute of limitations may be asserted as a defense. If a period of fewer than 30 days is specified, the district director, if possible, shall inform the named person of the prepenalty notice and its contents by telephone at or about the time of issuance.

(b) *Extensions.*—If at least 1 year remains before the statute of limitations may be asserted as a defense; the district director upon written request, may extend the time for filing a written presentation, or making an oral presentation, or both, for any of the reasons given

1930, as amended (19 U.S.C. 1592), for which proceedings commenced after December 31, 1978, the person named in the notice also may make an oral presentation seeking relief in accordance with this paragraph. For purposes of this paragraph, a proceeding commences with the issuance of a prepenalty notice or, if no prepenalty notice is issued, with the issuance of a notice of a claim for a monetary penalty.

(2) *Prerequisites.*—The person shall be given a reasonable opportunity to make an oral presentation provided that a petition has been filed under § 171.12, and that the petition contains a request to present orally the reasons for remission or mitigation of the penalty.

(b) *Other oral presentations.*—Oral presentations other than those provided in paragraph (a) of this section may be allowed in the discretion of the district director, regional commissioner, or Commissioner whenever a petition or supplemental petition is under his consideration.

4. § 171.22(a) is amended to read as follows:

§ 171.22 Special cases acted upon by district director.

(a) *Merchandise illegally transported coastwise.*—A forfeiture of merchandise or a claim for forfeiture of a monetary amount under title 46, United States Code, section 883, for illegally transporting merchandise coastwise, may be remitted by the district director, regardless of the value of the merchandise or the amount of the penalty, if the petition for relief establishes to the satisfaction of the district director that the violation occurred as a direct result of an arrival of the transporting vessel in distress.

5. Part 171 is amended by adding a new section 171.31a to read as follows:

§ 171.31a Written decision.

If a petition or supplemental petition (see sec. 171.33) for relief relates to a violation of section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), for which proceedings commenced after December 31, 1978, the petitioner shall be provided with a written statement setting forth the decision on the matter and the findings of fact and conclusions of law upon which the decision is based. Decisions on initial or supplemental petitions which are considered to be precedential in nature or otherwise significant will be published in the weekly CUSTOMS BULLETIN with appropriate deletion of information exempt from disclosure under part 103 of this chapter. For purposes of this section, a proceeding commences with the issuance of a prepenalty notice or, if no prepenalty notice is issued, with the issuance of a notice of a claim for a monetary penalty.

6. Section 171.32 is amended by revising the second sentence thereof to read as follows:

* * * If payment of the stated amount is not made, or arrangements made for delayed payment or installment payments, or a supplemental petition filed, within the effective period, the full penalty or claim of forfeiture shall be deemed applicable and shall be enforced by promptly referring the matter, after required collection action, if appropriate, to the U.S. attorney unless other action has been directed by the Commissioner of Customs.

(R.S. 251, as amended (19 U.S.C. 66), sec. 592, 46 Stat. 570, as amended (19 U.S.C. 1592), sec. 27, 41 Stat. 99, as amended (46 U.S.C. 883).)

PART 172—LIQUIDATED DAMAGES

1. Section 172.2 is amended to read as follows:

§ 172.2 Failure to petition for relief.

(a) *Referral of claim to U.S. attorney.*—If any party liable for liquidated damages fails to petition for relief or to pay or make arrangements to pay the liquidated damages within 60 days from the date of mailing of the notice of the liquidated damages incurred, as provided in section 172.1, or within such additional time as may have been granted, the district director of Customs, after required collection action, shall refer the claim promptly to the U.S. attorney.

2. Section 172.32 is being amended by revising the second sentence thereof to read as follows:

* * * If payment of the stated amount is not made, or arrangements made for delayed payment or installment payments, or a supplemental petition filed, within the effective period, the full claim for liquidated damages shall be deemed applicable and, after required collection action, shall be referred promptly to the U.S. attorney unless other action has been directed by the Commissioner of Customs.

(R.S. 251, as amended (19 U.S.C. 66) secs. 623, 624, 46 Stat. 759, as amended (19 U.S.C. 1623, 1624).)

[Published in Federal Register June 4, 1979 (44 F.R. 31950)]

(T.D. 79-161)

Wool, and Manmade Fiber Textile Products—Restriction on Entry

Restriction on entry of wool and manmade fiber textile products manufactured or produced in Yugoslavia

There is published below a directive of April 5, 1979, received by the Commissioner of Customs from the acting chairman, Committee

for the Implementation of Textile Agreements, concerning restriction on entry of wool and manmade fiber textile products in category 443/643 manufactured or produced in Yugoslavia.

This directive was published in the Federal Register on April 10, 1979 (44 F.R. 21319), by the committee.

(QUO–2–1)

Dated: June 1, 1979.

WILLIAM D. SLYNE
(For Ben L. Irvin, Acting
Director Duty Assessment Division.)

U.S. DEPARTMENT OF COMMERCE,
THE ASSISTANT SECRETARY FOR INDUSTRY AND TRADE,
Washington, D.C., April 5, 1979.

Committee for the Implementation of Textile Agreements

COMMISSIONER OF CUSTOMS,
Department of the Treasury,
Washington, D.C.

DEAR MR. COMMISSIONER: Under the terms of the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as extended on December 14, 1977; pursuant to the bilateral textile agreement of October 26 and 27, 1978, between the Governments of the United States and the Socialist Federal Republic of Yugoslavia; and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended by Executive Order 11951 of January 6, 1977, you are directed to prohibit, effective on May 1, 1979, and for the 12-month period which began on January 1, 1979, and extends through December 31, 1979, entry into the United States for consumption and withdrawal from warehouse for consumption, of wool and manmade fiber textile products, exported from Yugoslavia in the following categories, in excess of the indicated 12-month levels of restraint:

Category	*12-month level of restraint* [1]
443/643	13,462 dozen of which not more than 7,777 dozen shall be in category 443.

In carrying out this directive entries of wool and manmade fiber textile products in the foregoing categories, produced or manufactured in Yugoslavia, which have been exported to the United States prior

[1] The levels of restraint have not been adjusted to reflect any imports after Dec. 31, 1978.

to January 1, 1979, and entered on and after the effective date of this directive, shall not be charged against the levels of restraint established in this directive.

Wool and manmade fiber textile products in the foregoing categories that have been released from the custody of the U.S. Customs Service under the provisions of 19 U.S.C. 1448(b) or 1484(a)(1)(A) prior to the effective date of this directive shall not be denied entry under this directive.

The levels of restraint set forth above are subject to adjustment in the future according to the provisions of the bilateral agreement of October 26 and 27, 1978, between the Governments of the United States and the Socialist Federal Republic of Yugoslavia, which provide, in part, that: (1) Within the group limit the specific limit may be exceeded by not more than 5 percent in any agreement period; and (2) the group limit may be exceeded for carryover and carryforward not to exceed 11 percent of the applicable limit.

A detailed description of the textile categories in terms of TSUSA numbers was published in the Federal Register on January 4, 1978 (43 F.R. 884), as amended on January 25, 1978 (43 F.R. 3421), March 3, 1978 (43 F.R. 8828), June 22, 1978 (43 F.R. 26773), September 5, 1978 (43 F.R. 39408), January 2, 1979 (44 F.R. 94), and March 22, 1979 (44 F.R. 17545).

In carrying out the above directions, entry into the United States for consumption shall be construed to include entry for consumption into the Commonwealth of Puerto Rico.

The actions taken with respect to the Government of the Socialist Federal Republic of Yugoslavia and with respect to imports of wool and manmade fiber textile products from Yugoslavia have been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, the directions to the Commissioner of Customs, being necessary to the implementation of such actions, fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

EDWARD GOTTFRIED,
Acting Chairman,
Committee for the Implementation of Textile Agreements.

(T.D. 79–162)

Bonds

Approval and discontinuance of carrier bonds, Customs forms 3587

Bonds of carriers for the transportation of bonded merchandise have been approved or discontinued as shown below. The symbol D indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. PB refers to a previous bond, dated as represented by figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of the list.

Dated: May 31, 1979.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Alto's Express, Inc., 2301 Garry Rd., Cinnaminson, NJ; motor carrier; The Ohio Casualty Ins. Co.	Mar. 23, 1979	Apr. 2, 1979	Philadelphia, PA; $50,000
Alvan Motor Freight, Inc., 3600 Alvan Rd., Kalamazoo, MI; motor carrier; Hartford Accident & Indemnity Co.	Oct. 6, 1978	Apr. 18, 1979	Detroit, MI; $50,000
Ayers & Maddux, Inc., P.O. Box 1161, Nogales, AZ; motor carrier; Northwestern National Ins. Co. (PB 7/21/70) D 4/6/76 [1]	Apr. 10, 1979	Apr. 11, 1979	Nogales, AZ; $50,000
Barnes Freight Line, Inc., P.O. Box 800, Bankhead Ave., Carrollton, GA; motor carrier; Liberty Mutual Ins. Co.	Feb. 15, 1979	May 7, 1979	Mobile, AL; $25,000
The Besl Transfer Co., 5550 Este Ave., Cincinnati, OH; motor carrier; Fidelity and Deposit Co. of Maryland.	Apr. 27, 1979	May 10, 1979	Cleveland, OH; $50,000
Blue Line Transfer Co., Inc., 3rd & Broomall Sts., Chester, PA; motor carrier; The Hanover Ins. Co. D 5/7/79	May 7, 1969	May 14, 1969	Philadelphia, PA; $25,000
Day & Ross Ltd., P.O. Box 540, Hartland, New Brunswick, Canada; motor carrier; The Continental Ins. Co. (PB 3/19/77) D 5/10/79 [2]	May 9, 1979	May 11, 1979	Portland, ME; $25,000
Falcon Transport, Inc., P.O. Box K, Bird-In-Hand, PA; motor carrier; Pennsylvania National Mutual Casualty Ins. Co.	Aug. 14, 1978	Apr. 24, 1979	Buffalo, NY; $25,000
William M. Gibbons, Trustee of the Property of The Chicago Rock Island and Pacific Railroad Co., 332 South Michigan Ave., Chicago, IL; rail carrier; Ins. Co. of North America (PB 5/6/68) D 5/2/79 [3]	Apr. 30, 1979	May 2, 1979	Chicago, IL; $50,000

Footnotes at end of table.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
D & N Transportation Co., Inc., 28 Privilege St., Woonsocket, RI; motor carrier; Aetna Casualty & Surety Co.	Oct. 5, 1978	Apr. 30, 1979	Providence, RI; $25,000
Tommy Hagwood d/b/a Hagwood Enterprises, 2472 Pinson Hwy., Birmingham, AL; motor carrier; Ins. Co. of North America D 4/13/79	Apr. 1, 1977	Apr. 18, 1977	Mobile, AL; $25,000
Holt Motor Express, Inc., 701 N. Broadway, Gloucester City, NJ; motor carrier; Aetna Casualty & Surety Co.	Mar. 27, 1979	May 4, 1979	Philadelphia, PA; $25,000
Kars Transport, Inc., 3333 NW. 116th St., Miami, FL; motor carrier; Aetna Ins. Co.	Mar. 9, 1979	Apr. 3, 1979	Miami, FL; $25,000
Law Trucking Co., Crow Point Rd., Lincoln, RI; motor carrier; Western Surety Ins.	Apr. 11, 1979	Apr. 12, 1979	Providence, RI; $25,000
Lindy Trucking Inc., Industrial Park, Red Wing, MN; motor carrier; AID Insurance Co. (Mutual)	Dec. 7, 1978	Apr. 10, 1979	Minneapolis, MN; $25,000
Lion Transfer & Storage Co., 663 Taylor St., NE., Washington, D.C.; motor carrier; Fidelity & Deposit Co. of MD D 4/16/79	Apr. 14, 1976	June 16, 1976	Washington, D.C.; $25,000
Miami Transfer Co., P.O. Drawer D—N.W. Branch 10340 NW. 37th Ave., Miami, FL; motor carrier; Fidelity and Deposit Co. of MD D 5/16/79	July 17, 1974	July 29, 1974	Miami, FL; $25,000
F.W. Myers & Co., Inc., 69 Delaware Ave., Buffalo, NY; freight forwarder; Hanover Ins. Co.	Apr. 24, 1979	Apr. 25, 1979	Buffalo, NY; $50,000
National Trailer Convoy Inc., P.O. Box 3329; 525 S. Main, Tulsa, OK; motor carrier; St. Paul Fire & Marine Ins. Co.	Apr. 21, 1978	Apr. 18, 1979	Buffalo, NY; $50,000
Nationwide Carriers, Inc., P.O. Box 104, Maple Plain, MN; motor carrier; Aetna Casualty and Surety Co.	Apr. 10, 1979	May 9, 1979	Minneapolis, MN; $50,000
Ohio Container Service, Inc., 2701 Lakeside Ave., Cleveland, OH; motor carrier; Washington International Ins. Co.	Apr. 11, 1979	Apr. 12, 1979	Cleveland, OH; $50,000
Theodore J. Suleski, T/A Pacific East Air Freight Transfer, Inc., 34 Lakeview Dr., Cherry Hill, NJ; motor carrier; Fidelity & Deposit Co.	Feb. 21, 1979	Mar. 30, 1979	Philadelphia, PA; $25,000
Pinto Trucking Service, Inc., 1414 Calcon Hook Rd., Sharon Hill, PA; motor carrier; Investors Ins. Co. of America (PB 2/18/76) D 5/5/79 [4]	Feb. 1, 1979	Apr. 13, 1979	Washington, D.C.; $50,000
Pittsburgh & New England Trucking Co., 211 Washington Ave., Dravosburg, PA; motor carrier; Protective Ins. Co.	Dec. 4, 1978	May 4, 1979	Philadelphia, PA; $50,000
Riteway Transport, Inc., 2131 West Roosevelt, Phoenix, AZ; motor carrier; Peerless Ins. Co.	Mar. 26, 1979	May 10, 1979	Nogales, AZ; $25,000

Footnotes at end of table.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
John Petraglia d/b/a Southern California Warehouse Co., 524 E. San Ysidro Blvd., San Ysidro, CA; motor carrier; St. Paul Fire & Marine Ins. Co. D 4/27/79	Nov. 7, 1973	Nov. 13, 1973	San Diego, CA; $25,000
Taurus Trucking Corp., 199 Calcutta St., Newark, NJ; motor carrier; Sentry Ins. a Mutural Co.	Apr. 9, 1979	Apr. 10, 1979	Newark, NJ; $50,000
Truck Air of Georgia, Inc., 576 Lake Mirror Rd., College Park, GA; motor carrier; U.S. Fidelity and Guaranty Co.	Apr. 6, 1979	Apr. 30, 1979	Savannah, GA; $25,000
Trucker's Inc., 4316 South Main St., Stafford, TX; motor carrier; National Surety Corp.	Apr. 25, 1979	May 18, 1979	Houston, TX; $25,000
W. W. Trucking Co., Inc., Highway 574, P.O. Box 800, Dover, FL; motor carrier; Protective Ins. Co.	May 10, 1979	May 16, 1979	Tampa, FL; $25,000
C. G. Willis, Inc., Paulsboro, NJ; water carrier; Ins. Co. of North America (PB 5/9/69) D 5/9/79[5]	May 9, 1979	May 9, 1979	Philadelphia, PA; $100,000
Wilmar Trucking, Inc., P.O Box 369, Oaks, PA; motor carrier; Centennial Ins. Co.	Sept. 26, 1977	Apr. 5, 1979	Philadelphia, PA; $50,000
James Wise, 5002 San Bernardo, Laredo, TX; motor carrier; Lawyers Surety Corp. D 5/14/79	Nov. 1, 1975	Nov. 13, 1975	Laredo, TX; $25,000
Xpress Truck Lines, Inc., d/b/a XTL Inc., 4325 Bath St., Philadelphia, PA; motor carrier; The American Ins, Co.	Apr. 12, 1979	Apr. 12, 1979	Philadelphia, PA; $25,000

[1] Surety is Pacific Employers Ins. Co.
[2] Surety is Peerless Ins. Co.
[3] Principal is Chicago, Rock Island & Pacific Railroad Co. Surety is Federal Ins. Co.
[4] Surety is Heritage Ins. Co. of America.
[5] Surety is Planet Ins. Co.

BON–3–03

DONALD W. LEWIS
(For Leonard Lehman, Assistant
Commissioner Regulations and Rulings).

(T.D. 79–163)

TITLE 19—CUSTOMS DUTIES

CHAPTER I—U.S. CUSTOMS SERVICE, DEPARTMENT OF THE TREASURY

PART 159—LIQUIDATION OF DUTIES

Amendment of Waiver of Countervailing Duties—Certain Textiles and Textile Products From Brazil

AGENCY: U.S. Customs Service, Treasury Department.

ACTION: Amendment of waiver of countervailing duties.

SUMMARY: This notice is to inform the public that the waiver of countervailing duties issued regarding imports of certain textiles and textile products from Brazil is being amended. This amendment affects only imports of certain leather wearing apparel which, until recently, were duty free.

EFFECTIVE DATE: March 1, 1979.

FOR FURTHER INFORMATION CONTACT: Charles F. Goldsmith, economist, Office of Tariff Affairs, Department of the Treasury, 15th Street and Pennsylvania Avenue NW., Washington, D.C. 20220, telephone 202–566–2323.

SUPPLEMENTARY INFORMATION: On November 16, 1978, a notice of "Final Countervailing Duty Determination" (T.D. 78–446) regarding certain textiles and textile mill products from Brazil was published in the Federal Register (43 F.R. 53422). That notice advised the public that an investigation had determined that the Government of Brazil pays or bestows bounties or grants under the countervailing duty law on the manufacture, production, or exportation of certain textiles and textile products. Concurrent with that determination, a "Waiver of Countervailing Duties" (T.D. 78–447, 43 F.R. 53425) was granted based on actions taken by the Government of Brazil to reduce substantially the adverse effects of the bounties or grants paid or bestowed and on satisfaction of the other criteria of section 303(d) of the Tariff Act of 1930, as amended by the Trade Act of 1974 (Public Law 93–618, Jan. 3, 1975) (19 U.S.C. 1303(d)) (referred to as the act).

The final determination included leather wearing apparel imported under item No. 791.76 of the Tariff Schedules of the United States Annotated (TSUSA). In accordance with section 303(a)(2) of the act (19 U.S.C. 1303(a)(2)), because this merchandise was entered duty free pursuant to the U.S. Generalized System of Preferences (GSP) (authorized by title V of the Trade Act of 1974, 19 U.S.C. 2461–2465), countervailing duties could be imposed only if the U.S. International Trade Commission (ITC) rendered an affirmative injury determination. Liquidation of the leather wearing apparel under

consideration was suspended pending the determination of the ITC. At that time Treasury indicated that should the determination of the ITC be affirmative, it would then be appropriate to waive countervailing duties under section 303(d) of the act.

On March 5, 1979, the ITC published its determination in the Federal Register that no injury resulted from the importation of the duty-free leather wearing apparel from Brazil (Certain Leather Wearing Apparel from Colombia and Brazil, 44 F.R. 12113). Accordingly, the suspension of liquidation was to terminate and the liquidation of all entries of leather wearing apparel classified under TSUSA item No. 791.76 entered on or after November 16, 1978, would have proceeded without regard to countervailing duties, but for the action taken by the President which removed leather wearing apparel classified under TSUSA item No. 791.76 from the GSP. By Executive Order 12124, published in the Federal Register of March 2, 1979 (44 F.R. 11729), the duty-free status of leather wearing apparel classified under TSUSA item No. 791.76 was thus terminated effective March 1, 1979.

As a result, imposition of countervailing duties on such leather wearing apparel from Brazil is no longer controlled by section 303(a)(2) of the act. In the final determination of November 16, 1978 (cited above), the Department stated that if the ITC's determination of injury regarding such leather wearing apparel were affirmative, the collection of countervailing duties would be waived. Further, the reasons supporting the granting of the concurrent waiver (cited above) for then-dutiable textiles and textile products apply equally to the then-duty free leather wearing apparel classified under TSUSA item No. 791.76. Indeed, had such leather wearing apparel been dutiable in November 1978, it would have been included within the scope of the waiver then issued. Accordingly, I hereby amend the waiver with respect to certain textiles and textile products from Brazil to include the formerly duty-free leather wearing apparel classified under TSUSA item No. 791.76.

The table in section 159.47(f) of the Customs Regulations (19 CFR 159.47(f)), is amended by inserting after the entry from Brazil under "textiles", the number of this Treasury decision in the column so headed and the words "amendment of waiver" in the column headed "action."

(R.S. 251, secs, 303, as amended, 624; 46 Stat. 687, 759, 88 Stat. 2051, 2052, (19 U.S.C. 66, 1303), as amended, 1624).)

Dated: JUNE 1, 1979.

[Published in the Federal Register June 8, 1979 (44 F. R. 33063)]

ROBERT H. MUNDHEIM,
General Counsel of the Treasury.

U.S. Customs Service

Customs Service Decisions

The following are decisions made by the U.S. Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

Dated June 1, 1979.

LEONARD LEHMAN,
Assistant Commissioner,
Regulations and Rulings.

(C.S.D. 79-233)

Instruments of International Traffic: Portable Rubber Containers for the Transportation of Fruit Juice

Date: November 3, 1978
File: BOR-7-07-R:CD:C
103676/103307 JL

This ruling concerns a request that certain tanks used for the transportation of fruit juice be designated as instruments of international traffic within the meaning of 19 U.S.C. 1322(a).

Issue.—Do the tanks described below used to transport juice qualify as instruments of international traffic?

Facts.—The tanks are flexible and collapsible being constructed of either buytl or nitrile rubber reinforced with rayon, nylon, or high-strength terylene fabric. The tanks are supplied in capacities ranging from 3 gallons to 30,000 gallons, have a specific serial number painted on them, are suitable for and capable of repeated use, and are used in significant numbers in international traffic.

Law and analysis.—To qualify as an "instrument of international traffic" within the meaning of 19 U.S.C. 1322(a), an article must be used as a container or holder, must also be substantial, suitable for and capable of repeated use, and used in significant numbers in international traffic.

T.D. 78-212 states that flexible, collapsible rubber tanks designed

for the transportation of apple juice are designated as instruments of international traffic and may be released under the procedures provided for in section 10.41a of the Customs Regulations.

Holding.—The portable rubber containers described above are held to be similar to those discussed in T.D. 78–212 and therefore may be released in accordance with section 10.41a of the Customs Regulations.

(C.S.D. 79–234)

In-bond Entries: Whether Merchandise Temporarily Imported for Testing Must be Exported

Date: November 3, 1978
File: CON–9–09–R:CD:D
209282 MM

Issue.—Whether duty may be accepted on merchandise previously entered under a temporary importation bond in lieu of anticipated liquidated damages.

Facts.—A staple producing machine was shipped from an Italian parent company to its new Canadian facility. Due to a delay in construction of that facility and a lack of sufficiently trained personnel the parent company decided to have the machine shipped from the Canadian facility to a U.S. plant to test its production capabilities and the type of staples produced. The machine was entered under bond under item 864.30, Tariff Schedules of the United States, for that purpose.

Subsequently the Canadian facility was closed and the U.S. company has determined it would be impractical and prohibitive to send the equipment back to Italy or export it to Canada to cancel the bond.

The U.S. company requests to pay only the duty normally due on the equipment rather than the anticipated liquidated damages amounting to double the estimated duty.

Law and analysis.—Headnote 1, schedule 8, part 5C, Tariff Schedules of the United States, which governs the entry of articles admitted temporarily free of duty under bond, provides in part, that articles, when not imported for sale or sale on approval, may be admitted into the United States without payment of duty under bond for their exportation within certain time limits. The bond guarantees the exportation of articles admitted temporarily free and cancellation of the bond can only be accomplished by exportation or destruction of the merchandise.

Insofar as liquidated damages are concerned, section 10.39(d)(1) of the Customs Regulations states in part as follows:

> If any article entered under schedule 8, part 5C, Tariff Schedules of the United States, * * * has not been exported or destroyed

in accordance with the regulations in this part within the bond period (including any lawful extension), the district director shall make a demand in writing under the bond for the payment of liquidated damages equal to the entire amount of the bond. If the entry covering the articles is charged against a term bond, the demand shall be limited to an amount equal to double the estimated duties applicable to such entry, * * *

Holding.—Failure to export or destroy articles entered temporarily free of duty under bond constitutes a breach of bond resulting in a demand for liquidated damages in an amount equal to the entire amount of the bond. Once a claim for liquidated damages has been filed, however, an importer has the right to petition for relief from payment of liquidated damages in accordance with part 172 of the Customs Regulations.

(C.S.D. 79–235)

Temporary Importation Under Bond: Tinplate in Coils To Be Processed in the United States

Date: November 3, 1978
File: CON–9–04–R:CD:D
209486 W

Issue.—Is cutting tinplate in coils into shapes and decorating it with printed labels a process for purposes of 864.05, Tariff Schedules of the United States (TSUS)?

Facts.—The tinplate will be imported into the United States in the form of coils. The tinplate will be cut into shapes and decorated with printed labels. These processed shapes will then be exported. In some cases, the shapes will be manufactured into finished cans, and the cans themselves will then be exported. A full accounting will be made for all articles, wastes, and irrecoverable losses resulting fro n the processing in the United States.

Law and analysis.—Item 864.05, TSUS, permits the temporary free entry under bond of articles to be "repaired, altered, or processed (including processes which result in articles manufactured or produced in the United States)." The bond under item 864.05, TSUS, is taken in an amount equal to double the duties which it is estimated would accrue under an ordinary consumption entry. Cash may be deposited in lieu of surety on the bond and will be refunded on exportation or destruction of the articles under U.S. Customs supervision. Such articles, when not entered for sale or sale on approval, may be admitted for a period of 1 year, which may upon application be extended for additional periods, which when added to the original initial 1-year period, do not exceed a period of 3 years.

Based on the facts presented in this case, in accord with previous administrative rulings, the tinplate in coils is being processed within the purview of item 864.05, TSUS, and therefore may be entered thereunder.

Holding.—The operation described above is a process for purpose of item 864.05.

(C.S.D. 79–236)

Vessel Manifesting: Whether Gondolas and Flatbeds Must be Manifested Under 19 U.S.C. 1431

Date: November 7, 1978
File: VES–8–02–R:CD:C
103698 LLR

This ruling is concerned with the interpretation of the term "merchandise," as used in title 19, United States Code, section 1431 (19 U.S.C. 1431).

Issue.—Are gondolas and flatbeds merchandise which must be manifested in accordance with the provisions of 19 U.S.C. 1431?

Facts.—According to the inquirer, a typical gondola is constructed of steel and measures 20 feet long by 8 feet wide by 8 feet 6 inches high. They have front and rear panels but lack a roof and longitudinal sides. Flatbeds are completely open, constructed of steel, and measure 40 feet in length by 8 feet in width.

The gondolas and flatbeds are used to facilitate the movement of cargo which is too large or irregularly shaped to be placed in the standard shipping container. In addition, we are advised that the flatbeds are also used as "artificial tweendecks" to subdivide the vessel's storage space.

In the ordinary course of unlading the vessel, the gondolas and flatbeds are removed by a crane, connected to railroad cars or truck chassis, and transported with their cargo to the cargo's ultimate inland destination. Thereafter, the gondolas and flatbeds are returned to a vessel of the same shipping line.

Law and analysis.—19 U.S.C. 1431 requires the master of every vessel arriving in the United States to have a manifest on board. The manifest must contain, inter alia, "[a] detailed account of all merchandise on board such vessel * * *." 19 U.S.C. 1431(a). In addition the statute requires all ship's stores and sea stores to be included in the manifest. The inquirer contends that gondolas and flatbeds do not fall into any of the categories of things which must be manifested.

The Customs Service does not contend that the merchandise in-

volved is sea stores or ship's stores; and, therefore, will not analyze the inquirer's arguments to the same effect. A difference of opinion does arise, however, with respect to the inquirer's position as to the question of whether gondolas and flatbeds are merchandise.

The inquirer takes the position that, for purposes of 19 U.S.C. 1584, the statute providing for forfeiture of any merchandise not listed in the manifest, the term merchandise "is defined in its commercial, rather than in a scientific or literal sense." In *United States* v. *112 Casks of Sugar*, 33 U.S. 277 (1834), the authority for inquirer's previously quoted statement, the court was considering a tariff classification question, viz., was the merchandise which had been listed in manifest sugar or sirup. During its discussion of this question, the court said, at 279:

> That the determination of merchandise, subject to the payment of duties, is to be understood in a commercial sense, although it may not be scientifically correct. All laws regulating the payment of duties are for practical application to commercial operations, and are to be understood in a commercial sense.

It is readily observed that the question before the court was not whether there was merchandise to be manifested, but what kind of merchandise it was. "The word 'merchandise' is used in different senses in different parts of our customs legislation." 21 Op. Atty. Gen. 92, 94; *United States* v. *Chesbrough*, 176 F. 778, 781 (D.N.J. 1910).

In our opinion, the inquirer is seeking to graft an unjustified restriction on the term merchandise. The term "merchandise" is defined in 19 U.S.C. 1401(c) as "goods, wares, and chattels of every description, and includes merchandise the importation of which is prohibited." This term is broadly defined and when used in the manifest provisions is to be broadly construed. Prior to its enactment in its current form, the term merchandise was defined as follows: "May include goods wares, and chattels of every description capable of being imported." R.S., section 2766. Under this definition, the Supreme Court held opium, a prohibited importation, to be merchandise which must be reported in the vessel's manifest. *United States* v. *Sischo*, 262 U.S. 165 (1923). During the course of its opinion, which reversed the lower court's decision, the court, per Mr. Justice Holmes, discussed the rationale for requiring a manifest (a matter certainly relevant to the instant case):

> A government wants to know, without being put to a search, what articles are brought into the country, and to make up its own mind not only what duties it will demand, but whether it will allow the goods to enter at all.

United States v. *Sischo, supra*, at 167.

Further evidence as to the scope to be applied to the term merchandise can be found in *United States* v. *Chesbrough, supra*. In *Chesbrough*, the defendant demurred to several counts of an indictment brought under R.S., section 3082, a general antismuggling statute which provided penalties for 'fraudulently or knowingly import[ing] * * * any merchandise * * *." into the United States. The defendant failed to declare merchandise carried in her baggage and claimed that the penalties provided by section 3082 covered only general merchandise as distinguished from baggage. The court quickly disposed of this argument at 781:

> This limitation sought to be placed on the word "merchandise," viz., to the general merchandise requiring invoices, bills of lading, consular certificates, etc., is entirely too restricted. It is a primary rule in the construction of statutes that words of common use are not to be given any but their natural, plain, and ordinary signification, unless the context shows an intention to use them in a different sense. The word "merchandise" is no doubt used in different senses in different parts of the legislation on customs duties (21 Op. Attys. Gen. 92), in some instances very broadly, as authorized by section 2766, and in others more restricted. There is nothing in section 3082, where this word occurs, nor in act July 18, 1866, c. 201, 14 Stat. 178, from the fourth section of which such section is derived, nor in the Revised Statutes pertaining to customs duties, that suggest a legislative purpose to restrict such word to less than its ordinary meaning. On the contrary, in several sections contained in the fifth division of the Revised Statutes, relating to customs duties, and entitled "Entry of Merchandise," Congress has clearly envinced that the word "merchandise" is not to have the restricted meaning contended for.

Based on the above, we cannot agree with the inquirer's theory providing for the exclusion of the gondolas and flatbeds from the manifesting requirements because they are not merchandise, in a commercial sense.

The inquirer has also argued that the gondolas and flatbeds are "more nearly parts of the vessels themselves than either merchandise, sea stores, or ship's stores." Similarly, it is argued that gondolas and flatbeds are similar to containers, differing only in size and shape, viz., they perform the same functions as containers, both on and off the ship. Pursuing this line of reasoning, the inquirer cites *Matsushita Electric Corp.* v. *S/S Aegis Spirit*, 414 F. Supp. 894 (W.D. Wash. 1976), for the proposition that containers are like detachable stowage compartments of the ship. However, the inquirer has appropriately noted that the court in *Matsushita* was attempting to define the word "packages" as it is used in the Carriage of Goods by Sea Act. It was

not defining the word "merchandise" as it appears in the Tariff Act of 1930, as amended. In any event, the Customs Service and the laws and regulations it enforces require containers to be manifested.

The inquirer then attempts, at page 6 of the submission, to distinguish containers from gondolas and flatbeds by creating an artificial reason for the manifesting requirement:

> Many supposedly "empty" containers are later found to contain unmanifested cargo. Requiring the carriers to manifest the "empty" container enables Customs officials to trace the cargo to the carrier and collect appropriate duties, fines, or penalities.

This rationale does not hold true for gondolas and flatbeds, argues the inquirer, because cargo cannot be concealed in an open structure. This ignores the simple fact that there is no law or regulation which would exempt containers from the manifesting requirements of 19 U.S.C. 1431, irrespective of the fact that they may be instruments of international traffic. In fact, the Customs Service has already published its opinion that container-like structures, portable deck tanks, must be listed on the cargo manifest and not on the stores list:

> They shall be so listed even though they (a) contain cargo or are empty, (b) are to be landed or retained on board, (c) are to be released as instruments of international traffic * * *, or (d) are subject to entry and the payment of any applicable duties.

T.D. 55624(4), 97 Treas. Dec. 378 (1962).

Holding.—Gondolas and flatbeds are merchandise as that term is used in 19 U.S.C. 1431 and must be placed on the cargo manifest.

(C.S.D. 79–237)

Transshipment of In-Bond Merchandise: Designation of Private Carrier as Carrier of Bonded Merchandise

Date: November 8, 1978
File: BON–3–R:CD:D B
209380

Issues.—May a corporation, operating a private fleet of trucks, be designated a carrier of bonded merchandise under 19 U.S.C. 1551, despite not meeting all requirements of section 112.11(a)(4)(i)(ii)(iii), Customs Regulations? May such corporation transport its merchandise under its own bond, despite the fact such carriers are apparently reasonably available?

Facts.—A large corporation operates over 150 building materials wholesale distribution centers in the United States and Canada. The corporation operates a fleet of trucks to transport merchandise

throughout the United States and Canada. Much plywood imported by the corporation from the Far East is landed at U.S. ports and destined for Canada under transportation and exportation (T. & E.) entry. The corporation is required to transport the plywood by bonded common carrier and is precluded from using its own trucks by being designated a carrier of bonded merchandise because of failure to meet certain requirements of the applicable laws and regulations discussed further in this ruling. The applicant corporation requests that further study be made and that it be designated a private carrier of bonded merchandise as set out in 19 U.S.C. 1551, or that it be allowed to transport the merchandise under its own bond, despite the apparent availability of bonded carriers.

Law and analysis.—1. Section 1551, title 19, United States Code, provides:

> Designation as carrier of bonded merchandise. Under such regulations and subject to such terms and conditions as the Secretary of the Treasury shall prescribe * * *
>
> (1) any common carrier of merchandise owning or operating a railroad, steamship, or other transportation line or route for the transportation of merchandise in the United States.
>
> (2) any contract carrier authorized to operate as such by any agency of the United States, and
>
> (3) any freight forwarder authorized to operate as such by any agency of the United States.
>
> upon application, may, in the discretion of the Secretary, be designated as a carrier of bonded merchandise for the final release of which from customs custody a permit has not been issued. A private carrier, upon application, may, in the discretion of the Secretary, be designated under the preceding sentence as a carrier of bonded merchandise, subject to such regulations and, in the case of each applicant, to such special terms and conditions as the Secretary may prescribe to safeguard the revenues of the United States with respect to the transportation of bonded merchandise by such applicant.

The "Regulations" and "special terms" referred to in the statute which have been prescribed by the Customs Regulations, as follows:

> 112.11(a) Carriers which may be authorized * * * (4) Private carriers, if: (i) The private carrier is the proprietor of a Customs bonded warehouse; (ii) The merchandise to be transported is his property, having been imported by him * * * , and (iii) The merchandise is to be transported from the port of importation or port of entry for warehouse to the private carrier's Customs bonded warehouse for physical deposit, or from the private carrier's Customs bonded warehouse to another Customs bonded warehouse for physical deposit, or, if for exportation, from a Customs bonded warehouse of which the private carrier is the proprietor to a Customs bonded warehouse at the port of exportation.

It is clear from the statute that the Secretary has the authority to set the guidelines which will determine whether a private carrier is eligible for designation to transport bonded merchandise. Those carriers, other than private, which are enumerated in the law (19 U.S.C. 1551) are described specifically in chapters 1, 8, and 13 of the Interstate Commerce Act. The Congress, in amending the statute to provide for private carrier designation (Public Law 90–240, ch. 3, 1968) delegated to the Secretary the power to provide guidelines through regulations which define the type of private carrier eligible for designation. To allow any private carrier who maintains a large fleet of trucks to be designated a bonded carrier without further restriction, while other carriers enumerated in the law must fall within their respective definitions set out in the Interstate Commerce Act, would be contra the obvious intent of the Congress. It is for this reason private carriers are required to meet certain conditions set out in the Customs Regulations before they may apply for bonded carrier status. The applicant corporation is not the "proprietor of a Customs bonded warehouse," and even were the applicant such a proprietor, the imported plywood which the applicant wishes to transport would not be destined for a Customs bonded warehouse for exportation, but would be transported directly to Canadian wholesale distribution centers. That is, the type of movement which a private bonded carrier is allowed is restricted by section 112.11(a)(4), Customs Regulations Counsel for the corporation argues that the cited regulations do not apply to it inasmuch as they cover only "carriers from port to port in the United States," or "carriers between ports in Canada and Mexico." Counsel would have us read "port to port in the United States" as "port of importation in the United States to another interior port under bond for entry into the United States." Surely, "port to port in the United States" covers any movement of bonded merchandise, whether it be from port of unlading under in transit (IT) bond for entry at another U.S. port, or from the port of unlading under transportation and exportation (T. & E.) entry, under bond, to another U.S. port for exportation.

Were the applicant granted bonded private carrier status, although such carrier could operate under its own bond the restrictions placed upon such a carrier's movements by 112.11(a)(4), Customs Regulations, would not permit the movements contemplated by the applicant. Carriage of bonded merchandise by a private nonbonded carrier is possible, but such carriage must be made under the bond of a bonded public carrier. Should a public carrier of bonded merchandise allow its bond to be used by the applicant, the public carrier would be liable under its bond for any shortages, misdeliveries, etc., as set out in section 18.8(a), Customs Regulations.

2. Section 1553, title 19, United States Code, provides in relevant part:

> Entry for transportation and exportation. Any merchandise * * * shown by the manifest * * * or other document to be destined to a foreign country, may be entered for transportation in bond through the United States by a *bonded carrier* without appraisement or the payment of duties and exported under such regulations as the Secretary of the Treasury shall prescribe; * * * In places where no *bonded common carrier* facilities are *reasonably available*, such merchandise may be so transported otherwise than by a *bonded common carrier* under such regulations as the Secretary of the Treasury shall prescribe. [Italic added.]

The last sentence of the quoted statute apparently restricts carriage of bonded merchandise by other than bonded common carriers only when or where "bonded common carriers" are not available. We do not believe this to be the case. When 19 U.S.C. 1551 was first enacted in 1930, that law provided only common carriers could be designated as carriers of bonded merchandise. It follows that the term "bonded carrier" in 19 U.S.C. 1553 meant, in 1930, a "bonded common carrier" which had been designated under 19 U.S.C. 1551. The last sentence to 19 U.S.C. 1553, referring to "bonded common carrier", as added by legislative amendment (act of June 25, 1938, 52 Stat. 1087) in 1938, at a time prior to the amendments to 19 U.S.C. 1551 which added "freight forwarders", "contract carriers", and "private carriers" to the list of carriers which could be designated under that statute. Reading literally the last sentence of 19 U.S.C. 1553 would lead to the conclusion that bonded common carriers received preference in selection. That is, contract carriers or freight forwarders designated under 19 U.S.C. 1551 could not be employed for bonded movements wherever or whenever a bonded common carrier was reasonably available. Such a reading or interpretation would obviously be contra the intent of the Congress, as evinced by the amendments to 19 U.S.C. 1551 which increased the types of bonded carriers which can be designated to move bonded merchandise. We are of the opinion that the 1938 amendment to 19 U.S.C. 1553, whereby the last sentence was added, was not intended to benefit common carriers at the expense of other carriers, and the term "bonded common carrier" in the last sentence should be read as "bonded carrier", as set out in the first sentence of the statute. However, bonded merchandise may be moved otherwise than by a bonded carrier only such carriers are not reasonably available.

In cases where bonded carriers are not reasonably available, each private carrier who wishes, either regularly or irregularly, to transport his own goods under T. & E. entries shall, under the provisions of

section 18.20(b), C.R., be required to file bonds on Customs forms 7557, 7559, or other acceptable forms to cover the merchandise. Private carriers who do not have a proper bond on file will be given a reasonable time to comply with this bonding requirement. In isolated cases, when merchandise is transported through the United States for only a short distance by private carrier under T. & E. entries, such carriers may be permitted by the Customs officer concerned to carry the articles without filing of a bond.

3. Since the applicant cannot be designated a private bonded carrier, or, if so designated, the transportation contemplated would be without the purview of the regulations applicable to bonded private carriers, the applicant must show that no bonded carrier is "reasonably available" in order to transport the plywood under the applicant's own bond.

(a) The fact that a firm can transport its own merchandise at less cost than a bonded carrier is not alone controlling, since a carrier for hire must normally make a profit on its hauls while a firm hauling its own merchandise does not. However, if in any case an applicant claims that the cost of carriage of particular merchandise under the bond of a bonded carrier will be disproportionate to the value of the goods and furnishes written evidence in support of this claim, the District Director to whom such evidence is presented shall transmit the claim to Headquarters with his or her recommendation.

(b) The fact that a bonded carrier requires more time to make delivery to the port of departure from the United States does not alone establish the absence of a reasonably available bonded carrier. Longer delivery time may be a controlling factor, however. For example, if increased delivery time affects the quality or saleability of the merchandise, delivery time could be controlling.

(c) The fact that the route of a bonded carrier may be more circuitous than that of a nonbonded carrier likewise does not control; but if the bonded carrier service is relatively infrequent and/or the travel time of the bonded carrier route is much longer than the travel time of a nonbonded carrier, it may be found that bonded carrier facilities are not reasonably available.

(d) When refrigeration required for merchandise being transported cannot be supplied by a bonded carrier, bonded carrier facilities may be deemed not reasonably available.

(e) If for any legitimate business reason a shipper selects a particular kind of transportation facility, e.g., rail, air, or motor carrier, and this type of facility cannot be provided by a bonded carrier, such facilities may be found not reasonably available. For example, if a haulaway auto carrier is not reasonably available for the carriage of assembled automobiles, and no haulaway auto carrier is qualified

as a bonded carrier, a nonbonded carrier may be used for the auto transportation.

Holding.—(a) The applicant does not qualify for designation under 19 U.S.C. 1551 as a private bonded carrier of merchandise since the applicant does not meet the requirements of section 112.11(a)(4) of the regulations. If the applicant did so qualify under the law and regulations, the movements of merchandise contemplated would be restricted by the cited regulations.

(b) The applicant may submit to the appropriate District Director of Customs any evidence which supports a finding that bonded carrier facilities are not reasonably available. Those examples set out in section 3 of law and analysis are not the sole methods by which unavailability may be shown.

(c) Also, the applicant may pursue the possibility of transporting its plywood, under the bond of a bonded public carrier, as set out in 19 CFR 18.20(b).

Meanwhile we are examining the Customs Regulations pertaining to designation of private carriers as carriers of bonded merchandise to determine if any revisions should be made.

(C.S.D. 79–238)

In-bond Entries: Responsibility of Customs Officers in Reviewing Other Agencies' Forms Submitted With Entry Documents

Date: November 8, 1978
File: CON–9–R:CD:D WR 209299

This ruling concerns a Customs officer's responsibility when administering the laws and regulations of another Federal agency.

Issue.—Whether a Customs officer is responsibile for reviewing an importer's declarations on another agency's form for accuracy?

Facts.—The forms prepared by other Federal agencies often contain declarations stating that the entry "is being imported under bond." These forms are completed by the importer and are submitted to the Customs Service as part of the entry documents. The Customs Service has accepted the responsibility for sending the completed forms to the appropriate Federal agency.

Law and analysis.—The language "is being imported under bond" could refer to a temporary importation under bond (TIB) or to a consumption entry bond depending on the context of the entire declaration. A Customs officer is not responsible to determine the accuracy of any declaration on the other agency's form. However, the Customs

officer is responsible for insuring that the correct entry number sequence is shown on the other agency's form. Completion of the entry number block on the other agency's form will notify the other agency as to the type of entry. On the other hand, the Customs Service has complete responsibility to determine whether a TIB entry may be made. Because each of the forms provided by the other agencies requires completion of the entry number, a Customs officer need only insure that the entry number is correctly shown on those forms. Correct insertion of the entry number on the other agency's form will inform the other agency whether a TIB entry or a consumption entry was made. It is the responsibility of the other Federal agency to inform the Customs Service if liquidation of a consumption entry is to be withheld. A TIB entry that is subject to another agency's requirements is to be handled in accordance with normal Customs TIB procedures.

Holding.—A Customs officer is not responsible for checking the accuracy of an importer's declarations that are made on a form prepared by another Federal agency. A Customs officer is required to determine whether an article that is subject to the jurisdiction of another Federal agency may be entered on a TIB and to insure that the correct entry number is shown on the other agency's form.

(C.S.D. 79–239)

Bonds: Whether a Bond for the Establishment of a Container Station May Be Posted in a Reduced Sum; 19 CFR 19.40

Date: November 8, 1978
File: BON–3–R:CD:D
209525 L

Issue.—May bond for the establishment of a container station be posted in a sum less than the $25,000 prescribed in section 19.40, Customs Regulations (19 CFR 19.40) where exposure is said to be minimal due to the character of the merchandise imported?

Facts.—A wine importer and wholesale distributor has encountered severe delays in railroad service for carriage of its imported wine from the port of entry to its inland destination caused by a railroad shortage of temperature controlled trailers during winter months. As a result, the importer has applied for classification as a container station with the intent of picking up its own wine at the port of entry with its tractor and temperature controlled trailers and transferring the wine to its inland container station.

The importer notes that the minimum bond requirement for the establishment of a container station, as provided by section 19.40,

Customs Regulations, is $25,000, states that the surety company's exposure for a wine only container station is minimal due to the low excise and duty on wine, and asks if a reduction in the amount of the bond can be approved.

Law and analysis.—The Containerized Cargo Bond prescribed in section 19.40, Customs Regulations, is taken out by the container station operator and is conditioned upon compliance with the container station regulations. The bond is taken pursuant to the authority of 19 U.S.C. 1623. Section 19.40, Customs Regulations, provides in part that a container station may be established upon the filing of an application therefor and its approval by the district director and the posting of a bond in the sum of $25,000 or such larger amount as the district direct shall determine. The format of the bond is set out in the regulation. The containerized cargo bond is a term bond, the conditions and provisions of which apply to successive transactions of the principal charged against the bond during a period not to exceed 1 year.

The importer has submitted schedules for two containers apparently imported on August 25, 1978, with 707 and 1,013 cases of wine respectively and with duty and Federal excise tax liabilities of $856 and $1,243. There is, however, no indication of the frequency or total quantity of imports over a given period of time.

It is further noted that the obligations of the containerized cargo bond are not limited to duties and taxes but include, among other things, conditions that the principal pay such sums as are chargeable for any services performed for the containers and merchandise by Customs officers or employees; pay any charges, exactions, penalties, or other sums found legally due the United States by the principal; hold harmless the United States and its officers from any risk, loss, or expense which might occur by reason of the granting of any special license to discharge or take on merchandise in containers at night or on Sunday or holiday, and from any loss or damage resulting from fraud or negligence by any officer, agent, or other person employed by the principal by reason of the granting of any special license; and to pay other expenses as may be required by the district director.

Finally, we take note that wine is comparatively high value merchandise which may be an attractive target for pilferage or theft while at the container station.

Holding.—On the basis of the information available, there is no indication that the minimum bond amount of $25,000 prescribed in section 19.40, Customs Regulations, is excessive or unreasonable. Accordingly, in the circumstances described, the containerized cargo bond should not be approved in any sum less than $25,000, as prescribed in section 19.40, Customs Regulations.

(C.S.D. 79-240)

Coastwise Trade: Transportation of Van Used To Maintain and Repair Shipping Containers

Date: November 9, 1978
File: VES-3-20-R:CD:C
103639 DR

This ruling concerns the coastwise transportation of a repair van and its equipment by a foreign-flag vessel.

Issue.—Whether a foreign-flag vessel may, pursuant to section 4.93, Customs Regulations, transport between points in the United States, vans, materials, and equipment to be used in the repairing of the vessel line's containers.

Facts.—(Company) wishes to transport on its vessels, which are foreign-flag, a mobile van from New York to Baltimore. The van would be used to maintain and repair (company's) shipping containers and would be transported together with materials and equipment used in the repair and maintenance of the containers. (Company) is of the opinion that this transportation is permissible pursuant to the provisions of section 4.93, Customs Regulations, because, as the repair van and its equipment will be manned exclusively by longshoremen, such van and equipment fall within the definition of "stevedoring equipment" as that term is used in the Regulations.

Baltimore Customs authorities have refused (company) permission to move the repair van and equipment on the ground that such movement is not within the contemplation of section 4.93.

Law and analysis.—Title 46, United States Code, section 883, generally prohibits the transportation of merchandise between points embraced within the coastwide laws of the United States. However, the sixth proviso of section 883 permits foreign vessels, on the basis of reciprocity, and U.S. vessels not qualified to engage in coastwise trade to transport empty containers coastwise. An amendment to the proviso also permits, subject to the same qualifications, the transportation of equipment for use with containers and stevedoring equipment and material, if such equipment and material is owned or leased by the owner or operator of the transporting vessel, or is owned or leased by the stevedoring company contracting for the lading or unlading of the vessel and is transported free of charge.

Prior to the passage of the amendment to the sixth proviso, the Customs Service had ruled that the coastwise transportation of stevedoring equipment by a vessel not qualified to engage in the coastwise trade was prohibited by section 883. When the bill which amended the sixth proviso was presented to the Treasury for its

consideration, the Department reported to the Congress that, if enacted, the bill would facilitate the employment of articles in the "storage, lading, or unlading of cargo in foreign trade." The Congress then proceeded to enact the bill.

In order to promulgate this amendment, the Department issued paragraph (2) of section 4.93(a) of the Customs Regulations, the language of which is identical to that of the statute.

As a general rule of law, words used in a statute are to be given their usual and commonly understood meaning, unless it is plain from the statute that a different meaning is intended. Dictionaries define the term "stevedore" as one who works at, or one who is responsible for, the loading or unloading of a vessel. Thus the term "stevedoring equipment" would be equipment used to load or unload vessels.

As stated above, the Treasury Department reported to the Congress that the bill would affect articles used to load and unload cargo. As the Congress enacted the bill into law with the knowledge of how the words would be interpreted, we must assume that the Congress intended the statute to mean what the Treasury Department stated it would mean. The fact that certain equipment is used by stevedores does not by itself cause that equipment to be considered "stevedoring equipment and material" unless that equipment is used in the stowage, loading, and unloading of a vessel.

Holding.—In view of the clear and unambiguous wording of the statute upon which section 4.93(a)(2) is based, the transportation of articles not used in the stowage, lading, or unlading of cargo in the foreign trade (and articles not set forth in paragraph (1) of sec. 4.93(a)), between coastwise points of the United States in a vessel not qualified to engage in the coastwise trade does not fall within the scope of section 883 of title 46 and is prohibited.

(C.S.D. 79-241)

Prohibited and Restricted Importations: Copyright Infringement: Whether Toy Dog Skins and Stuffed Toy Dogs Are Substantially Similar to Copyrighted Cartoon Dog

Date: November 16, 1978
File: CPR-3-R:E:R
709547/709572 JJ

This ruling concerns whether or not certain imported toy dog skins and stuffed toy dogs are considered to be infringing importations pursuant to 17 U.S.C. 602.

Issue.—Would the importation of certain toy dog skins and stuffed

toy dogs infringe upon the rights of the copyright owner (corporate name), which has recorded the copyrighted (dog) character with Customs for import protection?

Facts.—A shipment of toy dog skins was imported and released to the importer. Another shipment of stuffed toy dogs was imported and detained by Customs in New York. Samples of both the imported (named) stuffed toy dog and toy dog skin have been submitted to our office.

The copyrighted (dog) character from the (named) comic strip (registered under several copyrights, including Reg. Nos. GP 61789 and GP 59162), recorded in the name of (copyright owner) has been registered with Customs for import protection (Bureau circulars COP–2–PM dated Apr. 30, 1969, and May 16, 1969).

Written representations of copyright piracy have been submitted by (name) and (name), attorneys for the copyright owner. A letter rebutting the charge of piracy was submitted by (name) for the importer.

Law and analysis.—Copyright owners may record their copyright registrations with Customs for import protection pursuant to 17 U.S.C. 603 and part 133, subpart D, of the Customs Regulations (19 CFR 133.31–133.37). (The copyright owner) has recorded its (dog) character with Customs pursuant to these regulations.

The text employed to determine whether a design has been copied is the substantial similarity test—i.e., whether an ordinary observer who is not attempting to discover disparities would be disposed to overlook them and regard their aesthetic appeal as the same. A comparison of the copyrighted character and the two imported items reveals obvious similarities.

All three dogs are predominantly white, with black markings for the eyes, nose, and ears. Each has a snout of similar shape and relative size. Each has a round black nose at the end of the snout. The crown of the head, placement of the eyes, and the relative size and shape of the ears are the same on the three dogs. Both the copyrighted (dog) and the imported dog skin have a movable black tail. All three dogs have large floppy black ears. The differences noted are trivial, such as differences in size and the fact that the imported dog skin and stuffed toy dog wear a red collar, while the copyrighted (dog) wears a black collar.

Holding.—Accordingly, we are satisfied under a responsible observer test that there has been so substantial an appropriation of a material part of the copyrighted article as to constitute piratical copying within the meaning of section 133.42 of the Customs Regulations. Pursuant to 17 U.S.C. 602, the importation of the toy dog skins and

stuffed toy dogs would be prohibited as infringing upon the rights of the copyright owner (corporate name).

Please notify the importer that this merchandise is subject to seizure and forfeiture in accordance with 17 U.S.C. 603. Also, please advise the importer of her right to petition for relief, pursuant to part 171 of the Customs Regulations. If your demand for redelivery of the prohibited dog skins cannot be met, a claim for liquidated damages should be made against the entry bond according to section 133.46 and 141.133(g) of the Customs Regulations. The copyright owner's bond may be returned in conformity with section 133.44(a) of the Customs Regulations.

(C.S.D. 79-242)

Generalized System of Preferences: Whether Dental Prosthetic Devices Meet the 35-Percent Value-Added Requirement

Date: November 16, 1978
File: R:CV:S BB
055599

This ruling concerns chrome-cobalt dental prosthetic devices to be imported from the Dominican Republic under the Generalized System of Preferences (GSP).

Issue.—Whether chrome-cobalt dental prosthetic devices meet the 35-percent value-added requirement in order to qualify for duty-free treatment under GSP?

Facts.—The articles in question are prosthetic dental devices which are chrome-cobalt cast. The samples are connectors which will hold artificial teeth or dentures in place. The prosthetic devices would be classifiable according to component material. If composed of chrome or cobalt, they would be classifiable as articles of base metal not coated or plated with precious metal under item 658.00, Tariff Schedules of the United States (TSUS). If composed of iron or steel, these devices would be classifiable as articles of iron or steel, not coated or plated with precious metal, under item 657.25, TSUS. Articles classified under either TSUS item number have been designated as eligible for duty-free treatment under GSP when imported from the Dominican Republic.

Stone models of patients' mouths made in the United States from dentists' impressions will be sent to a laboratory in the Dominican Republic. There the prosthetic devices will be made from U.S. materials and returned in a partially complete state.

The following cost data was submitted:

	Per unit
U.S. materials	$1.29
Direct labor	2.40
Assists (stone models)	1.75
General and administrative expenses	.77
Profit	.70
Total	6.91

Law and analysis.—Under the Generalized System of Preferences (GSP) eligible articles produced in designated beneficiary developing countries (BDC's) enter the U.S. duty-free if the sum of (1) the cost or value of the materials produced in the BDC plus (2) the direct costs of processing operations performed in such BDC is not less than 35 percent of the appraised value of such article at the time of its entry into the customs territory of the United States. In other words 35 percent of the value of the article, either materials or processing (or both), must be attributable to the BDC. Materials which are not wholly the growth, product, or manufacture of the BDC must be substantially transformed into a new and different article of commerce which is then used to produce the eligible article before their cost or value can be included in the 35-percent requirement.

The 35-percent requirement just set out is determined in relation to appraised value. The importer stated that these devices have never been produced abroad for export to the United States, and submitted cost data on forms designed for the calculation of constructed value. We proceed on the assumption that constructed value is the appropriate method of valuation, or that it affords a reasonably accurate approximation of the appraised value of the merchandise.

Since all materials are of U.S. origin and there is no indication that any materials have been substantially transformed, the question is whether direct costs of processing alone constitute 35 percent of the appraised value of the dental devices.

Customs Regulation 10.178 which defines "direct costs of processing," specifically excludes profits and general expenses of doing business. Includable are actual labor costs involved in the manufacture of the specific merchandise, including supervisory personnel; and costs of dies, molds, designs, blueprints, et cetera insofar as they are allocable to the specific merchandise.

In our opinion the stone models are entitled to be treated as assists such as are contemplated by Customs Regulation 10.178 (dies, molds, etc.). Therefore, their cost is includable in the 35 percent computation, along with direct labor costs. Together these costs comprise 60 percent of the total cost ($6.91) of the dental devices.

Holding.—Based upon the submitted data, the chrome-cobalt cast dental prosthetic devices in question appear to meet the 35-percent value-added requirement for duty-free treatment under GSP.

(C.S.D. 79–243)

Marking: Whether Lipstick Case Holders Imported in Marked, Unsealed Cardboard Boxes Must Be Marked With the Country of Origin

Date: November 17, 1978
File: MAR–2–05–R:E:R
709559 JJ

This ruling concerns whether or not plastic lipstick holders which are not individually marked with the country of origin but which are imported in marked unsealed cardboard boxes meet the country of origin marking requirements of section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304).

Issue.—Do unmarked plastic lipstick holders which are imported in unsealed cardboard boxes marked, in part "(name of company), distributor, New York, N.Y. 10019, made in Taiwan" comply with the country of origin marking requirements of section 304 of the Tariff Act of 1930 as amended (19 U.S.C. 1304)?

Facts.—The Customs office at J. K. F. Airport, New York, has detained 28 shipments totaling 2,991 cartons containing 104,685 dozen imported plastic lipstick holders which are reportedly not properly marked to comply with the provisions of section 304 of the Tariff Act of 1930.

Each lipstick case holder is a vinyl case with a mirror and snap fastener which is designed to carry a lipstick tube. Each lipstick holder, which is not marked with the country of origin, is packaged, in an unsealed cardboard box marked, in part "(name of company), distributor, New York, N.Y. 10019, made in Taiwan." A sample of the merchandise and its cardboard container were submitted to this office for examination.

The attorney for the importer has written a letter to the New York Customs Imports Compliance Branch requesting a marking exception for this merchandise on the grounds that it would be prohibitively expensive to mark these cases, 19 U.S.C. 1304(a)(3)(K). He has submitted data indicating that it would cost 8 cents per piece to mark these cases. The invoice value for these cases is approximately $1.23 per dozen (about 10.25 cents per piece).

Law and analysis.—Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), requires that all articles of foreign origin imported

into the United States are to be legibly, conspicuously, and permanently marked to indicate the English name of the country of origin to the ultimate purchaser of the goods. Since these lipstick holders are imported in unsealed cardboard boxes and there is no assurance that the unsealed boxes will reach the ultimate purchaser, the lipstick holders themselves should be marked with the country of origin on all future shipments.

Section 304(a)(3)(K) allows Customs to authorize a marking exception on any article if "Such article cannot be marked after importation except at an expense which is economically prohibited and the failure to mark the article before importation was not due to any purpose of the importer * * * to avoid compliance with this section." There is no evidence that the importer was attempting to avoid compliance with the marking requirements. Through his attorney, the importer has requested a marking exception for the lipstick cases already imported on the grounds that it would be prohibitively expensive to mark these cases individually. The importer's attorney has submitted data indicating that it would cost 8 cents per item to mark these lipstick holders at this point, while the invoice value of these holders is about 10.25 cents per piece. In view of the information presented, Customs will authorize a marking exception on the 2,991 cartons of lipstick cases which have already been imported and are being detained in New York.

Holding.—Unmarked plastic lipstick holders which are imported in unsealed, marked cardboard boxes do not comply with the country of origin marking requirements of section 304 of the Tariff Act of 1930. Future shipments of these lipstick cases must be individually marked with the country of origin.

(C.S.D. 79-244)

Marking: Calculators Assembled in Hong Kong From Components Produced in United States and Elsewhere; 19 U.S.C. 1304

Date: November 21, 1978
File: MAR-2-05:R:E:R
709633 AH

This ruling contains the country of origin marking requirements applicable to calculators assembled in Hong Kong.

Issue.—Whether "Hong Kong" alone or "Assembled in Hong Kong" without other designations as to the origin of components, is proper and acceptable country of origin marking for calculators

assembled in Hong Kong of components of U.S. origin, and/or other foreign countries.

Facts.—The particular calculator model to be imported is a desk-top model with printout capability. Products of Hong Kong and other countries may be used in the assembly of subsequent importation of these calculators.

The importer proposes to label the calculator with the designation "Assembled in Hong Kong."

The calculator is to be considered as a product of Hong Kong, the country of assembly for the purposes of country of origin marking requirements.

Law and analysis.—Section 1304, title 19, U.S.C., provides that all articles of foreign origin imported into the United States shall be legibly and conspicuously marked to indicate the country of origin to the ultimate purchaser in the United States unless certain exceptions are applicable.

Holding.—"Assembled in Hong Kong" is an acceptable form of marking for the purposes of 19 U.S.C. 1304, where an article is assembled in Hong Kong using components imported or largely imported from other countries. It is not necessary to disclose the country or countries of origin of the components used in the making of the finished product.

(C.S.D. 79-245)

Temporary Importation Under Bond: Sapphires Imported Solely for Fitting in the Manufacture of Earrings of Special Design for Export; Item 864.55, TSUS

Date: November 22, 1978
File: CON-9-13-R:CD:D
209429 L

Issue.—A pair of sapphires are imported temporarily to be used in the fitting process in the manufacture of a pair of earrings of special design for export. Are the sapphires, to be used only in the fitting process, eligible for entry as articles temporarily admitted free of duty under bond under either item 864.05 or item 864.55, Tariff Schedules of the United States (TSUS).

Facts.—A pair of pear-shaped sapphires weighing 45.57 carats have been imported for temporary use in the fitting process in the manufacture of a pair of earrings of special design for export. As soon as the fitting process is completed, the pair of sapphires will be returned abroad.

Law and analysis.—Subpart C, part 5, schedule 8, TSUS, provides for the temporary admission free of duty under bond of certain articles when not imported for sale or sale on approval. Item 864.05, TSUS, covers articles to be repaired, altered, or processed (including processes which result in articles manufactured or produced in the United States), and item 864.55, TSUS, covers articles of special design for temporary use exclusively in connection with the manufacture or production of articles for export.

Turning first to item 864.05, TSUS, the words "repair, alteration, or processing" are interpreted to cover a great variety of operations. However, the intended use of the pair of sapphires appears to be solely in the fitting process, and there is no indication that the sapphires will in any way be repaired, altered, or processed. The sapphires will be exported in precisely the same condition as they were imported. Since item 864.05, TSUS, applies only to those articles entered for the purpose of undergoing repairs, alterations, or other changes in condition, it is not applicable to the sapphires in this case.

Item 864.55, TSUS, was originally part of section 308(9) of the Tariff Act of 1930, as amended. The legislative history of that section discloses that it was enacted to enable domestic manufacturers to compete in foreign markets by manufacturing articles to the foreign purchasers' specifications and without having to pay duty on an article of special design furnished from abroad. The use of the word "exclusively" in this section is a mandate that it be construed strictly as to the use to which items imported thereunder are put while in the United States and the law is not intended to accord free entry to articles of special design used to manufacture articles for domestic consumption.

The phrase "in connection with the manufacture or production" is more difficult, although it is clear that an article of special design such as a mold or special tool would be admissible under this section. It is our view that the pair of pear-shaped sapphires weighing 45.57 carats imported solely for use in fitting in the manufacture of a pair of earrings of special design for export and which will be exported after the fitting is completed may be considered a unique or one-of-a-kind article similar to a mold or special tool and may be admitted temporarily free of duty under bond under item 864.55, TSUS.

Holding.—A pair of pear-shaped sapphires weighing 45.57 carats imported solely for use in fitting in the manufacture of a pair of earrings of special design for export, the sapphires to be exported after the fitting process is completed, are eligible for admission temporarily free of duty under bond under item 864.55, TSUS. The sapphires are not eligible for admission temporarily free of duty under bond under

item 864.05, TSUS, as they will not be repaired, altered, or processed in the United States.

The inquirer indicates that the sapphires are now in the United States. If the sapphires have been entered for consumption, it is noted that a claim for free entry under item 864.55, TSUS, cannot be substituted unless it can be established that the original entry was made on the basis of a clerical error, mistake of fact, or other inadvertence within the meaning of section 520(c)(1), Tariff Act of 1930, as amended, and was brought to the attention of the Customs Service within the time limits of that section.

The inquirer also asks if this procedure could apply on future importation. Assuming no change in the facts presented, the procedure could apply on future importation.

(C.S.D. 79–246)

Marking: Whether the Clock Portion of a Calculator-Clock Combination is Subject to Special Marking Requirements; T.D. 78–391, Modified

Date: November 22, 1978
File: MAR–2–05–R:E:R
709531 JJ

This ruling concerns the application of the special marking requirements of headnote 4, subpart 2E, schedule 7, TSUS, to electronic calculator-clock combinations.

Issue.—Are electronic calculator-clock combinations subject to the special marking requirements of headnote 4, subpart 2E, schedule 7, TSUS, for clock movements, where a single integrated circuit embodies all of the logic for performing the calculator functions of addition, multiplication, division, subtraction, taking square roots, et cetera, and also the timekeeping functions for the clock portion?

Background.—Manual transmittal No. 3600–291, dated July 17, 1978, transmitted Legal Determination 3611–274*, which had to do with the classification, GSP treatment, and marking requirements applicable to certain calculator-clock combinations. The ruling held, among other things, that the clock movement contained in the article was subject to the special marking requirements referred to above. An importer of calculator-clock combinations has requested reconsideration of this portion of the ruling.

Law and analysis.—Headnote 4, subpart 2E, schedule 7, TSUS, provides that any movement, case, or dial provided for in subpart 2E,

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whether imported separately or attached to an article provided for therein, is subject to certain marking requirements. Headnote 5 provides that a watch or clock movement and its dial (if any) in a combination article shall also be subject to the same marking requirements provided in headnote 4, except when installed as the usual equipment of vehicles or craft provided for in part 6 of schedule 6, TSUS, or as integral and essential parts of laboratory, industrial, or commercial apparatus or equipment.

The importer states that, technologically speaking, there is no "movement" in a solid-state electronic calculator-clock combination, since there are no springs, plates, gears, bearings, detents, mechanisms, balance wheels, or other moving parts present in the timekeeping (or the calculator) function. This is also true of electronic watch modules, however, which the Customs Service has held are subject to the special marking requirements. (Note ORR Ruling 77–0042, dated Sept. 20, 1977.)

The importer goes on to state further that, because the timekeeping function is also inextricably intertwined and embodied within the same component as is responsible for the calculating function, there is no way of precisely marking the part of the integrated circuit responsible for timekeeping with the prescribed markings for clock movements.

Holding.—Notwithstanding the mandatory nature of the special marking requirements applicable to watches and clocks, the Customs Service is of the opinion that the enforcement of the special marking requirements for the clock-calculators in question would be arbitrary and serve no useful purpose, since no part of the circuitry could properly be designated as the clock "movement." Accordingly, the special marking requirements are construed not to apply to these articles.

Effect on other rulings.—Legal determination 3611–274 is hereby modified insofar as the marking requirements of headnote 4, subpart 2E, schedule 7, TSUS, are concerned. The remainder of that ruling is not affected.

(C.S.D. 79–247)

Vessel Repair: Applicability of the Vessel Repair Statute to LASH Barges

Date: March 9, 1979
File: VES–13–18–R:CD:C
103728 JM

This case concerns the dutiability of foreign repairs to LASH barges.

Issue.—Are LASH barges "vessels" subject to the duty provisions of 19 U.S.C. 1466?

Facts.—(A corporate vessel owner) owns and operates LASH barges and mother vessels in the foreign trade. The barges often sustain damage and are repaired abroad. The operator has not filed vessel repair entries covering foreign repairs to the barges.

(The vessel owner contends) that the LASH barges are not "vessels" covered by 19 U.S.C. 1466, and that the barges should be considered "containers" and not subject to duty on foreign repairs.

Law and analysis.—Title 19, United States Code, section 1466, provides for payment of an ad valorem duty of 50 percent on the cost of foreign repairs to a vessel documented under the laws of the United States to engage in the foreign or coasting trade. LASH barges are documented to engage in the foreign trade. Section 1466 also provides that the Secretary of the Treasury is authorized to remit or refund duties if the vessel was compelled, by stress of weather or other casualty, to put into such foreign port and make the repairs to secure the safety and seaworthiness of the vessel to enable her to reach her port of destination.

Customs has consistently held that LASH barges are vessels. When documented and used in the foreign trade they are subject to the provisions of title 19, United States Code, section 1466, and the regulations thereunder upon arrival in the United States. (See sec. 4.14, Customs Regulations.) The fact that the barges are included in the formal entry of the transporting vessel does not excuse the master or agent who makes entry of the transporting vessel from the foreign repair reporting requirements for the barges.

Congress amended title 46, United States Code, section 883, to permit LASH barges to engage in coastwise trade to a limited extent. The seventh proviso to section 883 states:

> *Provided further*, That upon such terms and conditions as the Secretary of the Treasury by regulation may prescribe and, if the transporting vessel is of foreign registry, upon his finding, pursuant to information furnished by the Secretary of State, that the government of the nation of registry extends reciprocal privileges to vessels of the United States, the Secretary of the Treasury may suspend the application of this section to the transportation of merchandise between points in the United States (excluding transportation between the continental United States and noncontiguous States, districts, territories, and possessions embraced within the coastwise laws) which, while moving in the foreign trade of the United States, is transferred from a nonselfpropelled barge certified by the owner or operator, without regard to whether any such barge is under foreign registry or qualified to engage in the coastwise trade.

Since section 883 pertains only to the use of vessels in the coastwise

trade, Congress apparently had no question that LASH barges are vessels. Had Congress considered the LASH barges as other than vessels, the above amendment would not have been necessary and is, in fact, meaningless.

The vessel's owner relies on the decision by the Custom's Court in *Corpus Company, et al.* v. *United States*, C.D. 4390, which held that oceanographic research vessels were not subject to title 19, United States Code, section 1466. The court held that registered vessels which did not engage in foreign trade and were not intended to do so are not documented to engage in foreign trade within the meaning of section 1466.

The LASH barges in question are used in the foreign trade. In addition, Customs states that it is believed further argument can be made to convince the court that foreign repairs to oceanographic vessels are dutiable (T.D. 76–238). Accordingly, Customs has limited the decision in C.D. 4390 to the specific entries before the court in that case.

Holding.—LASH barges are vessels documented for the foreign trade, and are used in the foreign trade. The foreign costs of vessel repairs to and equipment purchases for (the owner's) LASH barges are therefore subject to duty under title 19, United States Code, section 1466. Duty shall not be remitted on those costs unless the owner presents evidence that the vessel was compelled by stress of weather or other casualty, while in the regular course of her voyage, to put into a foreign port to effect repairs. Relief is denied for the foregoing reasons.

(C.S.D. 79–248)

Bonds: Whether a Bond Rider May Be Incorporated by Reference Into the Bond Before Execution; Sureties

Date: November 27, 1978
File: BON–1–R:CD:D
209742 R

This ruling concerns the bonding requirements for entries made under the provisions of section 484 of the Tariff Act of 1930, as amended by section 102 of the Customs Procedural Reform and Simplification Act of 1978 (Public Law 95–410, 92 Stat. 888).

Issue.—(1) Whether a bond rider may be incorporated by reference into the bond before execution?

(2) Whether a surety who is authorized to use a facsimile signature and seal on a bond is authorized to execute a bond rider using a facsimile signature and seal?

Facts.—On November 20, 1978, the Acting Director, Duty Assessment Division, issued a memorandum (BON–3–O:D:E AO) to all

principal Customs field offices which contained a bond rider that is to be filed with any entry made under the provisions of section 484 of the Tariff Act of 1930, as amended. The rider is quite lengthy and execution of the rider may be difficult for principals and their sureties. A surety has agreed to be bound by the terms of the rider as set forth in that memorandum, but has requested permission to add a reference to an unexecuted bond form rather than printing and then executing the rider itself. On October 5, 1978, and October 25, 1978, the surety was permitted to use facsimile signatures and seals on Customs form 7551.

Law and analysis.—The Air Carrier Blanket Bond (Customs form 7605) is analogous to this situation. On that form the principal and sureties agree to be bound by the conditions set forth in three other bond forms. In this respect the Air Carrier Blanket Bond reflects the general rule that a reference in a contract to extraneous writings renders them part of the contract for the indicated purposes. See *General Electric Co.* v. *United States Dynamics, Inc.*, 403 F. 2d 933 (1st Cir. 1968); *Maryland—National Capital Park & Pl. Com'n* v. *Lynn*, 514 F. 2d 829 (D.C. Cir. 1975); and A.L.I. Restatement of Contracts 228 (1st ed. 1932). Consequently, there is no legal prohibition against incorporating the rider by reference on the bond form itself before the bond is executed.

The following language is considered sufficient to bind a principal and surety to the terms of the bond rider contained in the memorandum of November 20, 1978. After the last Whereas clause on Customs forms 7551, 7553, and 7595 the following clause is to be added:

> Whereas the principal and surety agree to be bound to the same extent as if they executed the bond rider set forth in the U.S. Customs Service memorandum (BON–3–O:D:E AO) dated November 20, 1978, on the subject entitled "Bond Rider—December 3, 1978";

and, after the last condition on Customs forms 7551, 7553, and 7595, the following condition is to be added:

> If all the conditions and obligations of the bond rider contained in the memorandum (BON–3–O:D:E AO) dated November 20, 1978, are complied with in connection with any entry or release of merchandise under section 484, Tariff Act of 1930, as amended;

Since the surety has been authorized the use of facsimile signatures and seals to execute a bond on Customs form 7551, there is no legal prohibition to extending that privilege to the execution of a rider which is to be attached to that bond. Of coure, the surety would have to satisfactorily indicate its intent to be bound by the facsimile signature and seal on the rider as though it was a manually affixed signature and seal.

Holding.—Until the regulations to implement the Customs Procedural Reform and Simplification Act of 1978 become effective, a surety may incorporate the terms of a bond rider into the bond by reference, before execution of the bond.

A surety who is authorized to execute a Customs bond with a facsimile signature and seal may execute a rider to that bond by the same method so long as the surety satisfactorily indicates an intention to be bound by the facsimile signature and seal as though they, are manually affixed. A written statement of intent signed by an authorized officer of the surety is satisfactory evidence of that intent.

(C.S.D. 79-249)

Foreign Trade Zone: Status and Time Limit for Physical Transfer of Merchandise Constructively Transferred to Customs Territory

Date: November 28, 1978
File: FOR-1-R:CD:D
209265 S

Issue.—1. What is the zone status of merchandise which has been constructively transferred to the Customs territory?

2. Is there a time limit for removal from a foreign trade zone of merchandise that has been constructively transferred to Customs territory?

Law and analysis.—1. Zone status. Sections 146.47(c) of the Customs Regulations provides as follows:

> (c) *Constructive transfer.*—Upon the approval by the district director of an application on zone form C, the merchandise shall be deemed to have been transferred to Customs territory but without physical removal from the zone. For all Customs purposes the merchandise shall be considered to have been imported into Customs territory at the time of this constructive transfer. The district director shall note on the application the date of constructive transfer and the zone status of the merchandise. The constructively transferred merchandise shall be marked or labeled with the initials "C.T."

This section clearly states that constructively transferred merchandise is to be treated as if "transferred to the Customs territory but without physical removal from the zone." Moreover, it is to be marked or labeled with the initials "C.T." to distinguish it from all other merchandise in the zone. The legal effect of constructive transfer is to remove the merchandise from the zone. Therefore, constructively transferred merchandise has no zone status within the meaning of subpart C of part 146 of the Customs Regulations. For inventory

and accounting purposes, the merchandise can best be described as "constructively transferred" or "C.T."

2. Removal from zone. Section 146.47(f) of the Regulations states that:

> (f) *Release of merchandise.*—When a consumption entry is accepted for zone restricted merchandise the district director shall release the merchandise to the grantee for delivery to the consignee. When any other entry or withdrawal is accepted for such merchandise, the release of the merchandise by the district director for physical removal to the designated destination in Customs territory or for direct exportation shall be in accordance with the Customs Regulations as to merchandise imported into Customs territory, the zone grantee to be the importing carrier.

Section 146.48(b) makes the provisions of section 146.47 (b) and (f), quoted above, applicable to articles having a zone status other than zone restricted. The only merchandise in a zone to which these transfer procedures do not apply is privileged merchandise or articles entirely composed of or derived from privileged merchandise.

Under section 146.47(f) the procedure for release of constructively transferred merchandise depends on what is to be done with the merchandise outside the zone. If the merchandise is constructively transferred and entered for consumption, the district director "shall release the merchandise to the grantee for delivery to the consignee".

On the other hand, when the district director accepts an entry or withdrawal for any purpose other than consumption, section 146.47(f) provides that the merchandise shall be physically removed from the zone "in accordance with the Customs Regulations as to merchandise imported into the Customs territory, the zone grantee to be the importing carrier". This provision incorporates the regulations and procedure applicable to direct importation without specific reference to time limits.

Although the Customs Regulations concerning entry do not provide exact time limits for the transfer of merchandise that has been entered or withdrawn, they clearly anticipate that physical removal of the merchandise will follow the entry or withdrawal without undue delay. In other words, the Customs Regulations applicable to release of merchandise imported directly by carrier do not anticipate delays in transfer to the warehouse or the port of exportation or destination.

A time limit on the physical removal from the foreign trade zone of merchandise that has been constructively transferred to the Customs territory is implicit in the fact that the entire procedure described in section 146.47 of the Regulations is intended to facilitate the physical transfer of the merchandise constructively (legally) transferred. Section 146.47(d) expressly provides for retention in the zone of constructively transferred merchandise, but only before the expiration of

the time limit for filing the entry or withdrawal. Merchandise legally considered to be in the Customs territory must be stored according to the Regulations applicable to merchandise in fact in Customs territory when such merchandise can no longer be restored to zone status. Accordingly, prompt removal is consistent with the purpose of the applicable statute and regulations.

Holding.—1. Merchandise that has been constructively transferred to Customs territory is neither privileged nor nonprivileged. Although legally in the Customs territory, such merchandise may be considered "constructively transferred" or "C.T." for Customs control purposes.

2. Constructively transferred merchandise that has been entered or withdrawn for consumption or for any other purpose, pursuant to section 146.47(e) of the Regulations, shall be physically removed from the foreign trade zone within a short time after its release pursuant to section 146.47(f). Normally 5 working days should be sufficient.

(C.S.D. 79–250)

Bonds: Single Entry Bonds on Customs Form 7551 for Merchandise Entered Under GSP

Date: November 28, 1978
File: BON–1–R:CD:D
209512 L/WR

Issue.—Must single entry bonds for merchandise entered under the Generalized System of Preferences (GSP) be in an amount equal to the value of the articles plus the maximum rate of duty prescribed by law?

Facts.—New York Regional Informational Pipeline No. 328, dated June 7, 1978, discusses single entry bond requirements for merchandise entered under the GSP. It makes reference to section 113.14(g)(i), Customs Regulations (19 CFR 113.14(g)(i)), and states that for all entries in the New York region covering the importation of GSP merchandise, where a single entry bond is used, the bond will be equal to the sum of the value of the article plus the maximum duty prescribed by law.

An inquirer has questioned the basis of this position stating that it believes that section 113.14(g)(i), Customs Regulations, refers only to merchandise entered at a reduced rate of duty and does not refer to merchandise that is conditionally free of duty. Essentially, the inquirer raises three points: (1) That parts 10 and 54 of the Customs Regulations appear to differ from the bonding requirements in Pipeline No. 328; and (2) that actual practice for merchandise en-

tered under specific Tariff Schedules of the United States (TSUS) item numbers, including those in schedules 7 and 8, TSUS, has been to require a bond equal to the value only and (3) that requiring a separate set of rules for GSP entries imposes an unfair burden on the importing public.

With respect to the last two points raised by the inquirer, we understand that the stated policy of the region is to require a bond in the amount of the value of the merchandise plus the estimated duty on all entries of merchandise conditionally free of duty. The only allowable exception is for merchandise that the appropriate Customs officer determines to be unconditionally free of duty within the scope of section 113.14(g)(1)(iii), Customs Regulations (19 CFR 113.14(g)(1)(iii)).

Law and analysis.—Part 10, Customs Regulations, provides for articles conditionally free, subject to a reduced rate, etc. Sections 10.171 through 10.178 of part 10 cover articles entered under GSP. Sections 10.171 through 10.178 were added to the Customs Regulations by T.D. 76–2, published in the Federal Register on December 31, 1975 (40 F.R. 60047) and amended by T.D. 77–27, published in the Federal Register on January 17, 1977 (42 F.R. 3161). Section 10.173(a)(3) requires, among other things, that if a properly completed certificate of origin (or duplicate thereof) is not produced at the time of entry, the entry will still be accepted, if all other applicable requirements are met, provided the importer or consignee gives a bond on Customs form 7551 (Immediate Delivery and Consumption Entry Bond (Single Entry)) for the production of the required certificate of origin. The bond is required to be given in the amount prescribed for that bond under section 113.14, Customs Regulations. Section 113.14(g)(i), Customs Regulations, covers merchandise entered at a reduced rate of duty under Customs form 7551 and provides that "When the bond is to cover merchandise granted a conditional right of entry at a reduced rate of duty, the amount of the bond shall be fixed in an amount equal to the value of the articles, as set forth in the entry, plus the maximum rate of duty prescribed by the law." This section applies to any entry involving a conditional reduction of the duty rate even if that rate is reduced to zero.

Part 54, Customs Regulations, refers to certain importations free of duty. Merchandise covered by section 54.5, Customs Regulations, is merchandise that is conditionally free of duty. Section 54.6(b), Customs Regulations, provides in part that if the articles are entered for consumption, there shall also be filed in connection with the entry of a bond on Customs form 7551. Therefore, the bond is required to be given in the amount prescribed for that bond under section 113.14, Customs Regulations, and is in an amount equal to the value of the

articles, as set forth in the entry, plus the maximum rate of duty prescribed by the law. There is no basis to differentiate between conditionally free merchandise covered by part 10, Customs Regulations, and conditionally free merchandise covered by part 54, Customs Regulations.

Because investigation disclosed that the stated policy at the region is to require a bond in the amount of the value of the merchandise plus the estimated duty, further discussion of that point does not appear to be necessary. However, we emphasize that any entry made contrary to that policy is also contrary to law unless the appropriate Customs officer is satisfied that the merchandise comes within the scope of section 113.14(g)(1)(iii), Customs Regulations (19 CFR 113.14(g)(1)(iii)).

Holding.—Single entry bonds (Customs form 7551) for merchandise entered under the GSP must be in an amount equal to the value of the articles, as set forth in the entry, plus the maximum rate of duty prescribed by the law.

(C.S.D. 79–251)

Carriers: Transportation of Passengers Between Points in the United States on a Foreign Civil Aircraft

Date: November 30, 1978
File: AIR–4–04–R:CD:C
103715 JM

This ruling concerns the transportation of passengers between points in the United States on a foreign civil aircraft.

Issues.—Can a foreign civil aircraft transport individuals within the United States if such individuals are carried as incidental traffic connected with the charterer's business interests and the individuals are transported without charge?

Facts.—A corporation based in Toronto, Canada, charters an aircraft and operates it for business purposes. The corporation plans to fly corporate employees into the United States and pick up individuals at one point in the United States for transportation to another point in the United States. These individuals will be transported without charge and will be connected with the business of the corporation operating the aircraft.

Law and analysis.—Title 49, United States Code, section 1508(b), generally prohibits foreign civil aircraft from transporting persons, property, or mail for compensation or hire between points in the United States. The Civil Aeronautics Board has previously held that foreign civil aircraft not engaged in commercial air operation into, out of, or within the United States may be operated in the United

States and may discharge, take on or carry between points in the United States any nonrevenue traffic.

Since the individuals in the subject case are connected with the aircraft operator's business and are carried on a nonrevenue basis, transportation of these individuals will not violate the provisions of section 1508(b).

Holding.—Individuals connected with the business of the aircraft operation may be transported in a foreign civil aircraft on a nonrevenue basis between points in the United States without violating title 49, United States Code, section 1508(b).

(C.S.D. 79–252)

Drawback: Whether Commingled Fungible Merchandise May Be Identified for Drawback Purposes on a First-In-First-Out Basis

Date: December 5, 1978
File: DRA–1–R:CD:D
209243 S

Issue.—Under section 313(b) of the Tariff Act of 1930, as amended (19 U.S.C. 1313(b)), may commingled fungible merchandise be identified on a first-in-first-out (FIFO) basis?

Facts.—A chemical manufacturer places domestic and imported material in common storage tanks. Because the material is fungible, there is no need to separate the imported material from the domestic material for manufacturing purposes. Generally, the manufacturer's inventory turns over approximately every 35 days. However, during the 35-day period the manufacturer adds new material to its inventory, so that the storage tanks always contain some material.

Law and analysis.—19 U.S.C. 1313(b) (substitution drawback) provides for drawback on exported articles manufactured with the use of imported duty-paid merchandise, domestic merchandise of the same kind and quality, or both. Although the law does not require use of the imported merchandise to manufacture the exported article, it does require use of the imported merchandise in manufacture within 3 years from the date of its receipt by the manufacturer.

The Tariff Act of 1930 contained the first substitution drawback provision, applicable only to sugar and nonferrous metals. As explained in the legislative history of the 1958 amendment that extended substitution to other types of merchandise, section 1313(b) was enacted to permit manufacturers to use cost-saving business practices without forfeiting drawback:

> The substitution provision * * * was designed to relieve processors and fabricators * * * of the difficulty and expense of

specifically identifying the imported materials that had been used in the production of exported products in order to establish eligibility for drawback. In support of the provision as originally enacted in the 1930 act, it was pointed out that sugar refiners and processors of nonferrous metal ores frequently use raw materials of both foreign and domestic origin and that only with great inconvenience and expense could these processors conduct their operations in such a way as to separately identify that part of their output containing imported materials and the actual amounts so used. Senate Report No. 2165, August 4, 1958, to accompany H.R. 9919.

Section 1313(b) allows drawback when manufacturers or producers maintain common inventories of domestic and imported merchandise of the same kind and quality. In keeping with the intent of the law, a practical method of identifying imported merchandise to account for its use within 3 years is needed. For this purpose first-in-first-out accounting (FIFO), which is widely used in business, is well suited. The FIFO principle already has been applied to cases under 1313(a) through section 22.4(f) of the Customs Regulations. It has proven to be convenient to administer.

Holding.—Drawback claimants filing under 19 U.S.C. 1313(b) may identify and designate merchandise used on a FIFO basis when fungible merchandise of the same kind and quality is commingled in storage or manufacture.

(C.S.D. 79–253)

Drawback: Substituted Domestic Merchandise of the Same Kind and Quality; Component of a Chemical Blend

Date: December 5, 1978
File: DRA–1–R:CD:D
209243 WR

This ruling concerns substitution of domestic merchandise for imported merchandise under the drawback law.

Issue.—Whether a domestic chemical that is part of a blended product is the same kind and quality as the pure imported chemical itself?

Facts.—A manufacturer uses imported and domestic dimethyl-aminoethyl methacrylate (DMAEMA) to make nine different polymers. In four of the polymers, the manufacturer also uses a domestic ingredient that is a blend of methyl chloride and dimethyl-aminoethyl methacrylate.

Law and analysis.—To be eligible for drawback under 19 U.S.C. 1313(b) imported duty-paid merchandise and duty-free or domestic

merchandise of the same kind and quality must be used in the manufacture or production of the exported articles. Generally, the requirement of same kind and quality is met if the exported articles can be made by using either the designated imported merchandise or the substituted domestic merchandise without changing the manufacturing process.

The Customs Service position is that a component of a chemical blend is not the same kind and quality as the component in its isolated state. For example, the copper in brass is not the same kind and quality as pure copper. The copper in brass cannot be used interchangeably with copper in its isolated state. In order to use the copper in brass as copper it is necessary to separate the copper from the brass.

Holding.—Dimethyl-aminoethyl methacrylate that is contained in methacryloyl-oxyethyl-trimethyl-ammonium-chloride is not the same kind and quality as dimethyl-aminoethyl methacrylate.

(C.S.D. 79–254)

Drawback: Whether Company Invoices May Be Used To Substantiate Exportation of Merchandise

Date: December 5, 1978
File: DRA-1-09-R:CD:D
209570 B

Issue.—May company invoices be used to support uncertified notices of exportation covering merchandise exported to Canada and Mexico under the Uncertified Notice of Exportation Procedure provided for in section 22.7(c), Customs Regulations (19 CFR 22.7(c))?

Facts.—A company wishes to supply company invoices to substantiate exportation of merchandise upon which drawback will be claimed.

Law and analysis.—Under the Uncertified Notice of Exportation Procedure, set out in section 22.7(c) of the regulations, uncertified notices of exportation (CF 7511's) must be supported by documentary evidence, such as the bill of lading, air waybill, Canadian Customs manifest, cargo manifest, or certified copies thereof, *issue by the exporting carrier*, and any additional evidence required by Customs officers to establish fully time and fact of exportation (italic added).

Although the listed papers are not exclusive and a variety of documents are used to support uncertified notices of exportation, the document used, if accepted by field drawback and audit personnel, must emanate from the exporting carrier, unless such exportation can be proved by "any additional evidence required by Customs officers". We have previously held that company documents consisting of

memoranda, orders, invoices, and the like, were unacceptable documentary evidence because of additional demands placed on regulatory audit staffs and the possibility of fraud.

In determining whether a document is acceptable as evidence of exportation, there are two possibilities of error or fraud which the Customs Service wants to avoid:

(1) That a claimant will prepare self-serving evidence, and;
(2) That a claimant will file more than one claim for drawback, based on a single exportation, by using multiple copies of company documents. Normally, these instances of error or fraud can be avoided if the document submitted is certified by a disinterested third party, for example, the carrier, or a customs officer.

Holding.—Company invoices are not acceptable to prove exportation. Other documents, such as inland bills of lading certified by the carrier, customs officer, or another disinterested third party having knowledge of the exportation, are acceptable.

(C.S.D. 79–255)

Instruments of International Traffic: Powerpak Units Containing Diesel Generators for Refrigerated Shipping Containers

Date: December 8, 1978
File: BOR–7–07–R:CD:C
103335 FOB

This ruling concerns the admission of powerpak units containing large diesel generators for refrigerated shipping containers as instruments of international traffic.

Issue.—Are these powerpak units "instruments of international traffic" pursuant to section 10.41a of the Customs Regulations?

Facts.—These portable powerpak units containing large diesel generators are used as a power source by (name) for their refrigerated shipping containers and are not used for any other purpose. We have been orally advised by your office that the powerpak units are attached to the containers and would be unladed and enter the United States with the containers.

Law and analysis.—Section 10.41a(a)(3), Customs Regulations, provides that the term "instruments of international traffic" includes the normal accessories and equipment imported with any such instrument which is a "container", as defined in the Customs Convention on Containers.

Holding.—Pursuant to section 10.41a(a)(3), as the containers qualify as instruments of international traffic and meet the definition of "container", as that term is used in the Customs Convention on

Containers, the powerpak units would be considered "instruments of international traffic" so long as they are attached to containers which are moving in international traffic.

(C.S.D. 79–256)

Entry: Immediate Delivery Procedure; Canned Meat Subject to Department of Agriculture Inspection and Release

Date: December 12, 1978
File: ENT–1–01 R:E:E
306571 K

This is in further reference to your letter of September 26, 1978, with enclosure, concerning Norfolk Customs' handling of canned meat products rejected by the Department of Agriculture. You state that you file an immediate delivery permit and request a USDA inspection at a terminal within the port. When the Customs inspector signs and dates the permit granting you permission to transfer the product, you become obligated to file an entry within 10 days after the date of release, even though Agriculture has not examined or released the product within that period.

You believe that Customs should not consider the permission to transfer the product as an official release, and that such release should be executed only after Agriculture has examined the product.

You also disagree with the policy expressed in Norfolk's Information Bulletin No. 85, which was amended to require the filing of a warehouse or a consumption entry for rejected meat products. You believe that this requirement conflicts with 19 U.S.C. 1557(a), and you have expressed your disagreement to Customs officers, verbally and in writing.

The district director at Norfolk advises that Agriculture's Meat and Poultry Branch (MPI) rarely examines shipments of canned meat at the point of discharge. Generally, the examinations are completed elsewhere within the port limits, under the provisions of section 12.8 of the Customs Regulations. Occasionally, shipments are transferred out of the district for destination examination under this same section of the regulations.

The district director also points out that MPI's determination as to admissibility of canned meat may range from 4 days to 6 months, depending upon the place of examination and the number of reexaminations required. It is his position that the 10-day period within which entry must be filed begins with the first release of the merchandise from the point of discharge (pier) after Customs examination has been completed.

We agree with the district director's position. The immediate de-

livery procedures cannot be interpreted to permit an indefinite delay of entry formalities until admissibility has been determined by another Government agency. Unless the provisions of section 142.14 of the regulations are timely complied with, an entry is required under section 142.11 of the regulations. Failure to comply with one or the other of these sections results in a demand for liquidated damages under section 142.15 of the regulations.

Title 19, United States Code, section 1557(a), provides in part; that with the exception of perishable articles and explosive substances other than firecrackers, any merchandise subject to duty may be entered for warehousing and be deposited in a bonded warehouse. Since the obligation to pay duties accrues only upon importation, it necessarily follows that in addition to those articles and substances mentioned in section 1557(a), any merchandise unconditionally prohibited by law or regulation from being imported into the United States would not be allowed entry into bonded warehouse.

We do not consider canned meat subject to another agency's inspection in order to determine its admissibility as being unconditionally prohibited because at the time of importation, it is not possible to determine its status. That can only be done after one or more examinations. Accordingly, canned meat may be entered for warehouse pending MPI's determination. If MPI finds the meat is prohibited, the importer must comply with Agriculture's instructions to destroy or export within the time allocated by MPI (condition 8 of the warehouse entry bond, CF 7555).

For these reasons, we see no conflict between Norfolk's Information Bulletin No. 85 and 19 U.S.C. 1557(a). The district director confirms the fact that he did extend the provisions of that bulletin to canned meats for approximately 30 days. However, upon receipt of information that this conflicted in part with MPI regulations against examining merchandise in a bonded warehouse, he revoked the application of that bulletin to canned meats, subsequent to the date of your letter.

(C.S.D. 79–257)

Drawback: Whether the Right to Claim Drawback is a Transferable Property Right

Date: December 12, 1978
File: DRA–1–R:CD:D
209534 S

Issue.—May a corporation claim drawback on exported articles manufactured with imported merchandise by another corporation that no longer exists?

Facts.—A new corporation (transferee) purchases the assets and rights and assumes the liabilities of an old corporation (transferor), which thereafter ceases to exist. The old corporation, operating with a drawback authorization under section 313(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1313(a)), imported merchandise, used it to manufacture articles for export, and exported the articles, all before the date of transfer. The new corporation wishes to file a drawback entry covering the articles on which the old corporation would have been entitled to drawback. The new corporation does not have a drawback authorization in its own name.

Law and analysis.—Legal determination 3740–05, issued February 14, 1978, discusses the transfer of a drawback authorization by amendment. In that case a factory and the records associated with production at the factory were transferred from one corporation to another. The transferee corporation asked whether it could use the drawback authorization of the transferor simply by amending the transferor's statement to indicate the change of name and corporate officials. The transferee planned to continue operations at the factory under drawback regulations.

The legal determination states that the transferee corporation should file a complete drawback application and statement in its own name. Amendment of the transferor's drawback statement is improper. However, the effective date of the transferee's drawback authorization may be as early as the date of transfer of the factory. In other words the right to drawback in this case will be continuous.

In contrast with this legal determination, the present case concerns the drawback-related activity of a transferor corporation. The issue is not whether a drawback authorization can be transferred, but whether the right to claim drawback can be transferred in a specific instance in which the transferor has imported the merchandise, used it to manufacture a product, and exported the product, according to procedures established in the transferor's drawback authorization. There is no issue concerning effective dates in this case, because all drawback-related activity (except filing) was performed after the transferor's effective date.

Holding.—The right to claim drawback on specific merchandise is a transferable property right. When a corporation transfers all its rights, assets, and liabilities to another corporation, it is clear, absent specific evidence to the contrary, that the transferee acquires the same right to claim drawback which the transferor had at the time of the transfer.

Without having a drawback authorization or filing an application of its own, the transferee corporation may claim drawback on articles manufactured and exported by the transferor corporation, in accord-

ance with section 22.21 of the Customs Regulations. The succeeded corporation in this case did everything necessary for drawback, except file the drawback entry (claim).

With each claim based on the transferor's authorization and records, the transferee must submit a statement describing in detail the transfer of the right to claim drawback, including the location of the relevant drawback authorization and records.

The claims may be filed in any Customs region listed in the transferor's drawback statement. Officials of the new corporation may sign drawback documents for the new corporation as "successor to the rights of (old) corporation," and in accordance with section 22.45 of the Customs Regulations.

(C.S.D. 79–258)

Instruments of International Traffic: Whether Permanently Mounted Container Beams are Afforded the Same Customs Treatment as Containers

Date: December 12, 1978
File: BOR–7–07–R:CD:C
103732 RB

This ruling concerns the Customs treatment of beams arriving with 20- or 40-foot containers.

Issue.—Are nonremovable "beams" permanently attached to 20- and 40-foot containers used in international traffic "normal accessories" of the containers with which they arrive, and thus subject to the same Customs treatment which the containers themselves would receive?

Facts.—You state that you have been operating 20- and 40-foot container equipment in international traffic for some time. The only thing that differentiates these units from standard 20- and 40-foot dry containers is that the inside top rail is slotted or grooved so that horizontal aluminum beams approximately 2 by 2 inches can be installed from which garments can be hung.

At any rate, because these beams have heretofore been removable fixtures, you have suffered a drastic loss of this equipment and, consequently, are now entertaining a design change which would cause the beams to be permanently affixed on one side of the container or, perhaps, on alternate sides.

As stated in your inquiry, the demountable beams have never been considered dutiable equipment separate and distinct from the container with which they arrive and you now inquire whether the tariff classification of the beams would be altered should a design change be

implemented allowing their permanent attachment to the dry containers.

Law and analysis.—Under Customs Regulation 10.41a(a)(1) (19 CFR 10.41a(a)(1)), containers in use or to be used in the shipment of merchandise in international traffic are designated as instruments of international traffic within the meaning of title 19, United States Code, section 1322(a). Such instruments may be released without entry or payment of duty, subject to the provisions of section 10.41a. Section 10.41a(a)(3) states that the term "instruments of international traffic" includes the normal accessories and equipment arriving with containers.

However, instead of being considered "normal accessories" of the containers with which they arrive, the beams, being permanently affixed to the containers, may be regarded as integral parts thereof and, consequently, on this basis, they would naturally be afforded the same Customs treatment which each container as a unified whole would receive.

Holding.—The permanently attached beams, being regarded as incorporated, integral parts of the containers, would be accorded the same Customs treatment which each container as a unified whole would receive.

(C.S.D. 79–259)

Marking: Further Processing of Transistors Assembled Abroad After Their Return to the United States as a Substantial Transformation

Date: January 11, 1979
File: MAR–2–05:R:E:R
705884 DDK

This matter involves transistors assembled in a foreign country with components which are a product of the United States, and returned to the United States for further processing.

Issue.—Does the process of completing the encapsulation of transistors by back-filling the cracks left from shrinkage of the initial molding operation with additional resin in a vacuum environment result in a "substantial transformation" for purposes of 19 U.S.C. 1304?

Facts.—A U.S. manufacturer furnishes the following components to another company, which arranges to have them sent to a foreign country for assembly: Frame, transistor die, and molding compound. The foreign assembly operation consists of mounting the transistor die on the stamped lead frame, and wire bonding between the contact points on the die and the frame. The frame is then transferred to a

molding press which encloses the die and wire with the molding compound. The devices are then returned to the United States.

Upon receipt, the U.S. manufacturer places the devices in a chamber where the air is evacuated and the devices are dipped into a tray of backfill resin. The resin is immediately drawn into the cracks and voids of the molding compound, The excess resin is removed by a flaming process and the transistors are marked, inspected, and tested before packaging and shipment to the customer.

Law and analysis.—In general, all articles of foreign origin imported into the United States are required to be marked to indicate the country of origin to an ultimate purchaser in the United States, with certain exceptions. Transistors which are assembled in a foreign country with components of domestic origin, as described above, are considered to be products of foreign origin, for purposes of 19 U.S.C. 1304. If the articles returned to the United States are subjected to a further processing after their return which results in a substantial transformation, the manufacturer or processor in the United States will be considered the "ultimate purchaser" of the returned articles, within the meaning of the principle of the decision in the case of *United States* v. *Gibson-Thomsen Co., Inc.*, 27 C.C.P.A. 217 (C.A.D. 98).

In the present case, the transistors are assembled and encapsulated with the molding compound in a foreign country. The additional resin back-filling treatment in this country after the transistors are returned is a continuation or completion of the encapsulation process begun in a foreign country.

Holding.—The completion in the United States by a resin backfilling operation of transistors which have been assembled and initially encapsulated with molding compound in a foreign country is not considered to result in a substantial transformation of the imported transistors. Accordingly, the processor who performs this operation is not considered the ultimate purchaser of the transistors, within the meaning of 19 U.S.C. 1304(a).

(C.S.D. 79-260)

Prohibited and Restricted Importations: Plastic Material in Continuous Lengths Incorporating Releasably Interlocking Rib and Groove Elements; Patented Reclosable Plastic Bag Device

Date: January 11, 1979
File: PAT-3-R:E:R
709241 SO

To: Assistant Area Director, C&V, New York Seaport.
From: Director, Entry Procedures and Penalties Division.

Subject: Exclusion Order 337–TA–22 (T.D. 77–94), Reclosable Plastic Bags, Extension of Coverage.

Your investigation has revealed that plastic material in continuous lengths incorporating releasably interlocking rib and groove elements as an integral part of the walls on facing inner surfaces, as described in claims 1 and 2 of U.S. Patent No. 3,198,228, is being imported through New York. You asked if this material should be denied entry pursuant to the provisions of Exclusion Order 337–TA–22.

We are of the opinion that the reclosable interlocking rib and groove device is the essential feature of the reclosable plastic bags protected by claims 1 and 2 of U.S. Patent No. 3,198,228; see Manual Supplement PAT–3 of August 12, 1977. Since the plastic material incorporates the protected mechanism, we are of the opinion that the unauthorized importation of this material constitutes a patent infringement. The fact that the plastic material may arrive as continuous tubing rather than as completed bags has no significance from a patent infringement standpoint. All that remains to be done in order to produce completed reclosable plastic bags from the imported plastic tubing is cutting and heat sealing, processes that are in common use and which cannot be patented.

Accordingly, the plastic material incorporating the interlocking rib and groove elements would be denied entry pursuant to the terms of Exclusion Order 337–TA–22, unless the import transaction is sublicensed by (name). In order to provide for uniform enforcement of the subject exclusion order, a copy of this decision will be circulated to all Customs officers.

(C.S.D. 79–261)

Country of Origin Marking: Envelopes Containing Golf Gloves

Date: January 11, 1979
File: MAR–2–05–R:E:R
709636 DB

This ruling concerns the country of origin marking of golf gloves and their containers.

Issue.—If imported golf gloves are properly marked to indicate the country of origin, are the envelopes in which they are packaged required to be marked with the country of origin if the envelopes are marked with the name of the U.S. distributor but not his address?

Facts.—An importer proposes to import golf gloves packaged in envelopes. The golf gloves themselves will be properly marked to indicate the country of origin by means of a sewn-in label. The ultimate purchasers can remove the gloves from the envelopes for the purpose

of trying on the gloves. The importer proposes to include the name of his company on the envelope, but not his address.

Law and analysis.—In general, all articles of foreign origin imported into the United States, or their containers, are required to be legibly and conspicuously marked to indicate the country of origin to an ultimate purchaser in the United States. If an article is properly marked with the country of origin, and the ultimate purchaser can remove the article from the container and examine it, the container itself is not ordinarily required to be marked to indicate the origin of the contents.

However, section 134.22(c), Customs Regulations (19 CFR 134.22 (c)), provides that containers or holders of imported merchandise bearing the name and address of an importer, distributor, or other person or company in the United States shall be marked in close proximity to the U.S. address to indicate clearly the country of origin of the contents. The purpose of this clearly is to prevent the U.S. address from misleading anyone into thinking that the article was made in the United States. This requirement also applies even though the article itself may be marked with the country of origin.

Holding.—If the envelopes containing the golf gloves contain only the name of the U.S. distributor, the envelopes will not be required to indicate the country of origin of the gloves. If the U.S. address is included on the envelopes, however, the envelopes must be marked with words such as "Made in (name of country)" to indicate the origin of the gloves.

(C.S.D. 79–262)

Country of Origin Marking: Face Plate Component

Date: January 17, 1979
File: MAR–2–05–R:E:R
709602 JB

This ruling concerns country of origin marking of a face plate part on which the name, but not the location, of the U.S. manufacturer will appear.

Issue.—Is country of origin marking required for future shipments of the face plate part if the name of the U.S. manufacturer appears on the item without its location?

Facts.—The imported face plate is to be used as a component of a taximeter assembled in the United States with domestic and several imported parts. The name of the U.S. manufacturer will appear on the face plate and future shipments of the article will not indicate the firm's address adjacent to its name.

Law and analysis.—If the face plate part is imported without marking or is marked to indicate the name of the U.S. manufacturer only (without its location), the item is not required to be marked to indicate the country of origin as it is used in the manufacture of a new and different article, a taximeter (19 U.S.C. 1304(a)(3)(D); 19 CFR 134.1(d)(1) and 134.35).

If, however, the location or address of the U.S. manufacturer appears on the face plate part, the item is required to be marked to include the name of the country of origin preceded by "Made in" or "Plate made in" under the provisions of 19 CFR 134.36.

19 CFR 134.46 provides that where the name of any locality in the United States (or the words or letters "United States," "American," "U.S.A.," or any variation thereof) appears on an imported article or its container, the name of the country of origin of the imported article must appear conspicuously and in close proximity to such locality in letters of comparable size preceded by "Made in," "Product of," or other words of similar meaning.

Holding.—The imported face plate component of a taximeter manufactured in the United States is not required to be marked "Made in West Germany" if the name of the U.S. manufacturer appears on the face plate without its address or location.

(C.S.D. 79-263)

Generalized System of Preferences: Whether a Christmas Tree Light Harness Is Substantially Transformed in a Beneficiary Developing Country

Date: January 30, 1978
File: R:CV:S BF
054584

This is in response to your letter of December 5, 1977, concerning the proper classification, country of origin for marking purposes and eligibility for treatment under the Generalized System of Preferences (GSP) of certain decorative lights to be chiefly used as a Christmas tree light set.

According to your letter, a wire with 10 light sockets connected thereto, known as a harness, is manufactured in Taiwan. The harness is imported into Hong Kong where a fuse plug is attached. Then, a light bulb is inserted into each socket located on the harness. A plastic ornament is attached and the finished light set is placed on a cardboard liner and inserted in a cardboard box with a cellophane window. The finished light set is exported from Hong Kong completely assembled

and ready for resale to, and immediate use by, the ultimate consumer as a Christmas tree light set.

We believe the decorative light sets are properly classifiable under item 688.10, Tariff Schedules of the United States (TSUS). Item 688.10, TSUS, is a designated article for GSP treatment, provided that the requirement of title 5 of the Trade Act of 1974 and 19 C.F.R. 10.171–10.178 are met.

19 C.F.R. 10.176(a) provides that merchandise which is produced in a beneficiary developing country and which is imported directly from such beneficiary developing country may qualify for GSP. Therefore, the light set would qualify for GSP only if it has been substantially transformed in the BDC.

The harness as exported from Taiwan constitutes an unfinished Christmas tree light set and would be properly classifiable under item 688.10, TSUS. The addition of light bulbs, plastic ornaments, and the fuse plug changes the lights set from an unfinished light set to a finished light set though it does not change the light set into a new and different article of commerce. The finished light set as imported is classifiable under item 688.10, TSUS, as the unfinished light set, the harness, is classifiable under item 688.10, TSUS. Therefore, the harness has not undergone a substantial transformation in Hong Kong and would not be eligible for treatment under GSP.

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides in general that all articles of foreign origin imported into the United States must be legibly and conspicuously marked to indicate the country of origin to an ultimate purchaser in the United States, with certain exceptions.

Since the Customs Service is of the opinion that this set does not constitute a new article of commerce, it would not properly be considered a product of Hong Kong for purposes of section 304, and it should be marked with Taiwan as the country of origin to satisfy the marking requirement.

Recent Unpublished Customs Service Decisions

The following listing of recent administrative decisions issued by the Office of Regulations and Rulings, U.S. Customs Service, and not otherwise published, is published for the information of Customs officers and the importing community. Although the decisions are not of sufficient general interest to warrant publication as Treasury decisions, the listing describes the issues involved and is intended to aid Customs officers and concerned members of the public in identifying matters of interest which recently have been considered by the Office of Regulations and Rulings.

A copy of any decision included in this listing, identified by its date and file number, may be obtained in a form appropriate for public distribution upon written request to the Office of Regulations and Rulings Attention: Legal Reference Area, room 2404, U.S. Customs Service, 1301 Constitution Avenue NW., Washington D.C. 20229. These copies will be made available at a cost to the requester of 10 cents per page. However, the Customs Service will waive this charge if the total number of pages copied is 10 or less.

Decisions listed in earlier issues of the CUSTOMS BULLETIN, through April 11, 1979, are available in microfiche format at a cost of $6.90 (15 cents per sheet of fiche). It is anticipated that additions to the microfiche will be made quarterly and subscriptions are available. Requests for the microfiche now available and for subscriptions should be directed to the Legal Reference Area. Subscribers will automatically receive updates as they are issued and will be billed accordingly.

Dated: June 4, 1979.

DONALD W. LEWIS,
Acting Assistant Commissioner,
Regulations and Rulings.

Date of decision	File No.	Issue
5– 9–79	103967	Carrier control: Whether a foreign-built vessel can be used for charter boat sport fishing and sightseeing on Guam
5–16–79	103971	Vessels: Liability of vessel charterer to pay special tonnage tax and light money
5–16–79	307027	Brokers: Purchase of customhouse brokerage business
5– 8–79	052571	Special appraisement: Whether the scribing and breaking of silicon wafers into chips is an alteration under item 806.20, TSUS
4– 9–79	057698	Classification: Semi-finished press-plates (678.35)
4– 6–79	057916	American selling price: Footwear (700.60)
3–26 79	057940	Classification: Folding baby bed (727.48, 727.55)
5– 8–79	061010	Classification: Fabrics exported for vinyl lamination process and returned (807.00)
5– 9–79	061277	Classification: Fiber optic cable; fiber optic couplers (708.29, 708.89, 807.00, 851.60)
5–10–79	063015	Classification: Asphalt shingles produced abroad from U.S. materials (807.00)

Decisions of the United States Court of Customs and Patent Appeals

(C.A.D. 1225)

DOLLIFF & COMPANY, INC. v. THE UNITED STATES No. 78–15
(— F. 2d —)

1. American Goods Returned—Alterations—TSUS

Customs Court decision that Canadian-performed processing steps of heat-setting, chemical scouring, dyeing, chemical-finishing and cutting on U.S. origin greige goods do not comprise "alterations" under item 806.20 TSUS is affirmed.

2. Id.

Intermediate foreign processing steps performed on U.S. origin articles subsequently reimported into the United States that result in differences in name, value, appearance, size, shape, and use for the articles are necessarily precluded from being classified as "alterations" under item 806.20 TSUS.

3. Id.

Intermediate processing operations which are performed as a matter of course in the preparation or the manufacture of finished articles do not comprise "alterations" under item 806.20 TSUS.

U.S. Court of Customs and Patent Appeals, May 31, 1979

Appeal from U.S. Customs Court, C.D. 4755

[Affirmed.]

William E. Melahn (Doherty and Melahn) attorneys of record, for appellant.

Barbara Allen Babcock, Assistant Attorney General, *David M. Cohen*, Acting Director, *Joseph I. Liebman*, *Jerry P. Wiskin* for the United States.

[Oral argument by William E. Melahn for appellant and by Jerry P. Wiskin for appellee]

Before MARKEY, *Chief Judge*, RICH, BALDWIN and MILLER, *Associate Judges*, and NEWMAN,* *Judge*.

*The Honorable Bernard Newman, U.S. Customs Court, sitting by designation.

BALDWIN, Judge.

[1] This is an appeal from the judgment of the United States Customs Court, 81 Cust. Ct. 1, C.D. 4755, 455 F. Supp. 618 (1978), holding certain dacron polyester fabrics to be properly classified under item 338.30 [1] of the Tariff Schedules of the United States (TSUS) and not under item 806.20 TSUS.[2] We affirm.

Background

This appeal involves certain dacron polyester fabrics which were manufactured in the United States, exported to Canada as greige goods for further processing, and then imported back into the United States. Upon the U.S. importation, a duty on the fabric was assessed under TSUS item 338.30 as "Woven fabrics, of manmade fibers * * * Other." Appellant, in an appeal of this classification to the Customs Court, contended that the processing in Canada constituted an alteration within the scope of TSUS item 806.20. Under this proposed classification, a duty is imposed only on the value of the alterations performed in Canada.

Customs Court

In its opinion, the Customs Court summarized the Canadian processing steps as follows: [3]

> The essential facts concerning the processing operation in Canada are not in dispute. The domestic loom product is exported

[1] Item 338.30 provides as follows:

SCHEDULE 3.—TEXTILE FIBERS AND TEXTILE PRODUCTS

PART 3. WOVEN FABRICS

* * * * * * *

Subpart E. Woven Fabrics, of Man-Made Fibers

* * * * * * *

338.30	Other	[Applicable Rate]

[2] Item 806.20 provides as follows:

SCHEDULE 8.—SPECIAL CLASSIFICATION PROVISIONS

PART 1. ARTICLES EXPORTED AND RETURNED

* * * * * * *

Subpart B. Articles Advanced or Improved Abroad

* * * * * * *

	Articles returned to the United States after having been exported to be advanced in value or improved in condition by any process of manufacture or other means:	
806.20	Articles exported for repairs or alterations	A duty upon the value of the repairs or alterations.

[3] Mr. Chace, president of the manufacturer of the goods in question, Berkshire Hathaway Inc. of New Bedford, Mass., testified before the Customs Court that the exportation of the goods to Canada was necessary because the only processor with the proper equipment to accommodate the fabric was located in Canada. During the course of his testimony, Mr. Chace also explained the processing steps performed in the United States which resulted in the manufacture of the greige goods.

> as *greige goods* in rolls of approximately 800 to 1,000 yards in length and approximately 118 to 119½ inches in width. It is returned as *finished fabric* suitable for manufacture into curtains, folded over double, widthwise, and cut in lengths of approximately 60 to 80 yards. In Canada the greige goods are subjected to a number of operations, consisting of heat-setting, chemical-scouring, dyeing and heat-setting a second time during which finishing chemicals consisting of melamine resin for anticreasing characteristics, an antistatic chemical, and a softener chemical are applied to the fabric in this final stage. The initial heat-setting treatment serves to stabilize the fabric through the elimination of shrinkage. Scouring removes sizing and impurities from the fabric. And the second heat-setting treatment induces a permanent adherence of the finishing chemicals to the fabric during the drying stage of the processing. The finished fabric is then inspected, folded and shipped back to the United States. [Footnotes omitted. 81 Cust. Ct. at —, 455 F. Supp. at 619.]

Upon considering the testimony and exhibits proffered during the trial, the court concluded that the greige goods and finished fabrics differed in name; that the finished fabrics were softer and more full than the greige goods; that the finished fabrics were sold for $1.50 to $1.60 per yard more than the greige goods; that the griege goods and finished fabrics differed in size; and that the greige goods and finished fabrics were sold to different classes of buyers and in different commercial markets. Citing *A. F. Burstrom* v. *United States*, 44 CCPA 27, C.A.D. 631 (1957), the court held the processing in Canada did not merely amount to alterations under 806.20 because the imported finished fabrics were not the same articles as the exported griege goods since they differed in name, value, appearance, size, shape, and use.

The court also relied on *Burstrom*, *supra*, to dispose of appellant's argument that the Canadian processing merely resulted in an alteration of the goods because both the exported greige goods and imported finished fabrics were woven fabrics of manmade fibers and were classifiable under the same tariff item, i.e., item 338.30. The court distinguished its holding in *Amity Fabrics, Inc.* v. *United States*, 43 Cust. Ct. 64, C.D. 2104 (1959), that dyeing of fabric is an alteration, by noting that, in the instant case, the Canadian processing resulted in other significant changes. The court further stated:

> The court is of the opinion that where, as here, foreign processing of an exported article, to whatever degree, produces such changes in the performance characteristics of the exported article as to alter its subsequent handling and uses over that which earlier prevailed, the resultant product is of necessity a new and different article. [81 Cust. Ct. at —, 455 F. Supp. at 622.]

Appellant's Arguments

In support of his alternative classification, appellant cites the following definition of the phrase "repairs or alterations" from the

Treasury regulations in effect at the time the entries in issue were filed: [4]

> The term "repairs or alterations" shall be held to mean restoration, change, addition, renovation, cleaning, or other treatment which does not destroy the identity of the article exported or create a new or different article.

According to appellant, this definition means that processing which effects some change or addition to an article can be considered an "alteration" as long as the article remains basically the same. Appellant argues that the articles in question remained basically the same because both the greige goods and finished fabrics were manmade fabrics of polyester fiber and, thus, the Canadian processing steps did not change the essential characteristics of the fabrics.[5]

Appellant further contends a reasonable interpretation of 806.20 contemplates changes in articles which result in advancements in value or improvements in condition and, therefore, the mere fact that the Canadian processing resulted in changes in name, appearance, value, size, shape, and use does not require a determination that such processing did not comprise alterations within the meaning of 806.20.

Appellee's Arguments

In its brief, appellee cites testimony in the record supporting the Customs Court's determination that the greige goods differed from the finished fabrics in name, value, appearance, size, shape, and use. Appellee also alleges that the Canadian processing limited the number of potential uses of the greige goods to the single use for the finished fabric, i.e., as curtain material. Further, appellee agrees with the Customs Court's conclusion that where, as here, the foreign processing has created a new article, the fact that the article as exported and the article as imported are classifiable under the same TSUS item is immaterial. Finally, appellee notes that to extend this argument of appellant to its logical conclusion would necessarily mean that had the Canadian processing transformed the fabrics into curtains, wearing apparel or the like, such processing would also be mere alterations because these articles would also be comprised of manmade fabrics of polyester fabric.

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[4] This definition first appeared in 89 Treas. Dec. 263, T.D. 53611 (Sept. 30, 1954). The definition referred to paragraph 1615(g) of the Tariff Act of 1930, ch. 497, Public Law No. 361, 46 Stat. 674, as amended by the Customs Administrative Act of 1938, ch. 679, Public Law No. 721, 52 Stat. 1092, to extend to articles exported for alterations the same treatment then accorded to articles exported to be repaired. See H. Rept. No. 1429, 75th Cong., 1st Sess. 6 (1937). This subparagraph was adopted as item 806.20 TSUS as a result of the Tariff Classification Act of 1962, Public Law No. 87-456, 76 Stat. 72. See Tariff Classification Study, schedule 8, p. 12 (Nov. 15, 1960.)

The definition of "repairs and alterations" was deleted from the regulations by 6 Cust. Bull. 209, T.D. 72-119 (May 2, 1972).

[5] According to evidence in the record, the fabric was intended to be used as material for making curtains. In his testimony, Mr. Chace stated that the greige goods could be used as curtain material but that it differed from the finished fabrics in resistance to wrinkling and shrinking, drapability, and choice of colors.

Opinion

[2] Appellant correctly contends that simply because intermediate foreign processing of articles of U.S. origin that are subsequently reimported into the U.S. results in differences in name, value, appearance, size, shape, and use for the articles does not require a conclusion that the foreign processing does not comprise "alterations" under TSUS item 806.20. This is self-evident from this tariff provision which levies a duty only on the increase in value due to the alterations. Similarly, to hold that alterations cannot change the name, appearance, size, shape, and use of an article unreasonably restricts the scope of item 806.20.

Being correct on this one point, however, does not save appellant's case because, as noted in *Burstrom*, *supra* at 31, a "distinction which must be made is between the terms 'repairs,' 'alterations' and 'processing.'"

That such a distinction has been recognized by Congress is apparent from the Customs Simplification Act of 1954, chapter 1213, Public Law No. 768, 68 Stat. 1137, which extended to certain foreign processing operations, the tariff treatment previously accorded to repairs and alterations.[6] The reasons for this amendment were noted by this court in *United States* v. *Douglas Aircraft Co.*, 62 CCPA 53, 57, C.A.D. 1145, 510 F. 2d 1387, 1390 (1975) as follows:

> [I]t appears that, in the case of articles sent by U.S. manufacturers along the Canadian border to Canada, for processing and return to the United States for additional processing, duty was imposed on not only the value of the Canadian processing but also on the value of the article in its original exported form. Such treatment was based on subparagraph 1615(g) of the Tariff Act of 1930, as amended by the 1938 act, with interpretation by the Customs Service of "repairs" and "alterations" being limited chiefly to those of a mechanical nature on equipment such as locomotives and buses. It was objected that imposing duty on the value of the article in its original exported form constituted a duty on American material and American labor. *Hearings on H.R. 5106 Before the House Comm. on Ways and Means*, 83d Cong., 1st Sess., 199–200 (1953).

[6] This provision has been incorporated into the TSUS as item 806.30 which provides:

806.30	Any article of metal (except precious metal) manufactured in the United States or subjected to a process of manufacture in the United States, if exported for further processing, and if the exported article as processed outside the United States, or the article which results from the processing outside the United States, is returned to the United States for further processing	A duty upon the value of such processing outside the United States (see headnote 2 of this subpart).

In addition to that observation, two things are evident from the very language (see supra note 6) of the provision. First, it applies to intermediate processing operations which are performed abroad as a matter of course in the preparation of certain articles. Second, this advantageous tariff treatment for regularly performed intermediate foreign processing is limited to articles made of metal.

[3] It follows generally from these two points that repairs and alterations are made to completed articles and do not include intermediate processing operations which are performed as a matter of course in the preparation or the manufacture of finished articles. In the instant situation, the operations performed in Canada comprise further processing steps which are performed on unfinshed goods and which lead to completed articles, i.e., the finished fabrics, and, therefore, the processing cannot be considered alterations.

This view is consistent with this court's previous interpretation of the term "alterations" in *United States* v. *The J. D. Richardson Company*, 36 CCPA 15, C.A.D. 390 (1948). At issue in that case was the question of whether the processing performed in Canada on a U.S. origin metal wheel rim resulting in flanged rims for importation into the United States constituted "alterations" under paragraph 1615(g).

The court stated:

> It clearly appears from the record that the articles exported to Canada were not parts of machines but were manufactures of metal. It is true that they had been so processed as to be dedicated to the use of making rims for the T–26 tank. However, they were not completed parts but, on the contrary, required the manufacturing processes hereinbefore referred to in order to complete them as "flanged" rims for their intended use. Broadly, it may be said, as seems to have been held by the trial court, that the term "alterations" of articles means any manufacturing process to which articles may be subjected. *We are of opinion, however, that Congress did not intend by the term "alterations" in paragraph 1615(g), supra, to mean that uncompleted articles, such as those here involved, manufactured in the United States or imported into the United States, could be exported to a foreign country and there manufactured into completed articles such as those in the case at bar, and when returned to the United States, be subject only to duties on the so-called "alterations" provided for in paragraph 1615(g), supra.* [*Id.* at 17. Italics ours.]

The case law also includes two examples of foreign processing which merely involved alterations to finished goods. In *Wilbur G. Hallauer* v. *United States*, 40 CCPA 197, C.A.D. 518 (1953), this court determined that the cleaning, grading, wrapping, and packing in Canada of American-grown apples constituted "alterations" within the meaning of the then applicable paragraph 1615(g). Appellant had

claimed that no duty should be imposed because "apples went out and apples came back." Id. at 201. Although the court did not dispute the fact that the apples were complete when exported to Canada, it concluded that the Canadian operations had converted the articles from bulk apples to a different unit of merchandise, packaged apples, and that a duty could be imposed on the resultant increase in value.

In a case of particular relevance to the instant appeal, the Customs Court in *Amity Fabrics, Inc.* v. *United States*, supra, held that the dyeing of certain fabrics comprised an alteration under paragraph 1615(g). In that case, velveteen fabric had been dyed a particular color and placed on sale in the United States. The color proved to be unpopular and, as a result, the fabric was exported to Italy, dyed black, and then imported back into the United States and placed on sale. The court concluded that this processing was an alteration of an already finished fabric to place it in a more marketable condition without either destroying its identity or creating a new article.

In the instant situation, the dyeing and numerous other processing steps are all necessarily undertaken to initially produce the finished fabric and, thus, a result different from that in *Amity*, supra, must be reached.[7]

Finally, we find no merit in appellant's argument that because both the greige goods and finished fabrics are manmade fabrics of polyester fiber and would be classifiable under the same TSUS item, the Canadian processing merely comprised alterations. The irrelevance of such common classification was noted by this court in *Burstrom, supra* at 30, when we stated:

> Appellant attempts to distinguish the instant case from *United States* v. *The J. D. Richardson Company*, 36 C.C.P.A. (Customs) 15, C.A.D. 390. The court there held that unflanged rims or flat bands exported from this country and reimported after being flanged by three pressing operations, had been changed to new articles and had not merely been altered. Here the foreign processing has likewise created new articles and the law of the *Richardson* case applies. Appellant argues that the fact that the exported ingots and the imported slabs, in the instant case, would be dutiable under the same paragraph distinguishes this case from the *Richardson* case where the exported and imported wares were subject to different duties. This difference is immaterial where the foreign processing has created a new article.

Further, to follow appellant's reasoning could lead to the anomalous

[7] For another Customs Court opinion holding that certain processing operations did not merely comprise alterations within paragraph 1615(g), see *C. J. Tower & Sons of Niagara, Inc.* v. *United States*, 45 Cust. Ct. 111, C.D. 2208, 177 F. Supp. 470 (1960), wherein the court reviewed processing steps performed in Canada on American origin cotton greige goods that resulted in finished fabrics of different colors, sizes, porosities, thread distributions, weights, tensile strengths, textures, and finishes.

result that all articles made from the finished fabric would be commonly classified because they would also be manmade fabrics of polyester fiber.

Conclusion

The Canadian processing operations did not comprise alterations under item 806.20 TSUS. The judgment of the Customs Court is *affirmed.*

Decisions of the United States Customs Court

Tentative Dockets Outside New York, N.Y. of the U.S. Customs Court

To implement the authority conferred upon the chief judge of the U.S. Customs Court by 28 U.S.C. §§ 253(b) and 256(a), and for the convenience of parties in requesting trials or oral arguments of dispositive motions at places other than New York City, there is set out below a list of tentative dockets, arranged according to the 11 Judicial Circuits of the United States, showing the months for which trials or oral arguments of dispositive motions may be requested

within each Judicial Circuit at any place where a United States District Court is located.

In addition, upon request of a party showing that the interests of justice, economy or efficiency will be served, the chief judge may designate a trial to be held, or an oral argument of a dispositive motion to be heard, at a time or place different from those which are listed below.

Requests for trials or oral arguments of dispositive motions at places other than New York City must be served and filed in accordance with the time periods specified in, and the other provisions of, rule 9.1 of the rules of the U.S. Customs Court, and should be addressed, with a copy to all other parties, to:

Clerk of the Court,
United States Customs Court,
One Federal Plaza,
New York, N.Y. 10007

After receipt of a request for a trial or oral argument of a dispositive motion at a place other than New York City and any responses to the request, the chief judge may issue an order. The order, which will set the place and date of, and designate a judge to preside at, the trial or oral argument, will be issued to the parties by the clerk of the court at least 15 days before the scheduled date, or such shorter time as the chief judge may deem reasonable.

These procedures and the tentative dockets set out below will become effective October 1, 1979, and will continue thereafter until changed.

Dated at New York, N.Y.
This the first day of June 1979.

JOSEPH E. LOMBARDI,
Clerk of Court.

Federal Judicial Circuit	*Months*	
FIRST: (Maine, Massachusetts, New Hampshire, Rhode Island, Puerto Rico)	March	September
SECOND: (Connecticut, New York, Vermont)	April	October
THIRD: (Delaware, New Jersey, Pennsylvania, Virgin Islands)	February	August
FOURTH: (Maryland, North Carolina, South Carolina, Virginia, West Virginia)	January	July
FIFTH: (Alabama, Florida, Georgia, Louisiana, Mississippi, Texas, Canal Zone)	January	July
SIXTH: (Kentucky, Michigan, Ohio, Tennessee)	May	November
SEVENTH: (Illinois, Indiana, Wisconsin)	May	November
EIGHTH: (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota)	June	December

Federal Judicial Circuit	*Months*	
NINTH: (Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington)	February	August
TENTH: (Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming)	April	October
DISTRICT OF COLUMBIA	March	September

Customs Decisions

(C.D. 4803)

B. & K. INSTRUMENTS, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT. } Court Nos. R65/25188, etc.

Instruments and parts

Certain sound level meters and octave filter sets were appraised on the basis of foreign value, as defined in section 402a(c), Tariff Act of 1930, as amended, predicated upon the Customs' finding that the articles came within the final list designation "Instruments and parts, laboratory, sound measuring."

Plaintiff claims the merchandise does not come within the purview of the final list designation and should be appraised on the basis of export value, as defined in section 402(b), Tariff Act of 1930, as amended.

The term "laboratory instruments" has been construed as implying use for laboratory purposes, meaning use for experiment or study. *The A. W. Fenton Co., Inc.* v. *United States*, 67 Cust. Ct. 519, R.D. 11755 (1951), *aff'd*, 70 Cust. Ct. 286, A.R.D. 313 (1973).

Plaintiff has failed to discharge its burden of establishing the imported instruments are of a class or kind which are not chiefly used for laboratory purposes.

[Judgment for defendant.]

(Decided May 22, 1979)

Allerton deC. Tompkins for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Chief, Customs Section; *John J. Mahon*, trial attorney), for the defendant.

FORD, Judge: The articles involved in these five consolidated appeals for reappraisement consist of instruments and parts invoiced

as models 2203 and 2204 sound level meters and model 1613 octave filter sets, which were appraised on the basis of foreign value [1] as defined in section 402a(c), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, T.D. 54165. The basis of appraisement was predicated upon a finding by Customs that the articles came within the designation "Instruments and parts, laboratory, sound measuring," which appears on the final list of articles issued by the Secretary of the Treasury and published in 93 Treas. Dec. 14, T.D. 54521, covering articles to be appraised under section 402a, Tariff Act of 1930, as amended, supra. The appraised values were found to be the invoiced unit prices, net, packed, plus 29.03 percent. B. & K. Instruments, Inc., the plaintiff-importer of record, and the exporter, Bruel & Kjaer, were at the time of exportation related persons within the meaning of section 402(g) of the Tariff Act of 1930, as amended, supra.

The court has before it for determination the issue of whether the importations are laboratory instruments, or parts thereof, within the meaning of the final list. Plaintiff has conceded they are sound measuring instruments or parts thereof.

Plaintiff contends the importations are not on the final list inasmuch as they are not laboratory instruments and parts, and therefore the proper basis of appraisement is export value as defined in section 402(b),[2] Tariff Act of 1930, as amended, *supra*, which values are represented by the invoiced unit prices, net, packed, less the 29.03 percent addition.

At trial the parties stipulated if the court finds the merchandise is not on the final list, the proper basis of appraisement would be export value at invoice values.

The record consists of the testimony of five witnesses, two called on behalf of plaintiff and three on behalf of defendant. In addition, 11 exhibits were received on behalf of plaintiff and 8 on behalf of defendant, 1 of which was a collective exhibit (exhibits A–1 through

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[1] Section 402a(c), as amended, provides;

(c) FOREIGN VALUE.—The foreign value of imported merchandise shall be the market value or the price at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale for home consumption to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, including the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

[2] Section 402(b), as amended, provides:

(b) EXPORT VALUE.—For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

A–4). Included before this court is the record in *The A. W. Fenton Co., Inc.* v. *United States*, 67 Cust. Ct. 519, R.D. 11755 (1971), *aff'd*, 70 Cust. Ct. 286, A.R.D. 313 (1973). By the incorporation of the record in the previously decided case, the court has before it for consideration all of the facts established in the earlier case. The merchandise involved in that case is described in the findings of fact of the trial court as follows:

> 1. That the merchandise involved herein consists of the following electronic instruments and parts manufactured by Bruel & Kjaer, Copenhagen, Denmark, and exported from that country from 1959 through 1962: 3322, audio frequency response and spectrum recorder; 3311, 3313, audio frequency spectrum recorders; 2111, 2112, 2141, audio frequency spectrometers; 1611, 1612, 1/3 octave filter sets; 1619, extension filter set; ZS–0146, filter chassis; 2603, 2604, microphone amplifiers; 3330, narrow band spectrim recorder; 2107, frequency analyzer; 2612, 2613, 2615, cathode, followers; 4131, 4132, 4133, 4134, condenser microphone cartridges; 4408, two channel microphone selector; UA–0030, input adaptor; UA–0034, flush mounting; UA–0039, extension connector; UA–0040, probe microphone set; UA–0051, UA–0052, nose cones; 4412, floor stand; JJ–2612, input adaptor.

It also appears from the court's decision that the enumerated instruments and parts were appraised on the basis of foreign value, as defined in section 402a(c), Tariff Act of 1930, as amended, predicated, as in the case at bar, upon the Customs' finding that the articles came within the final list designation, "Instruments and parts, laboratory, sound measuring." The record therein established that certain of the analyses and recording instruments were chiefly used for nonlaboratory purposes and therefore were erroneously appraised. They were items 3322, 3311, 3313, 2111, 2112, 2141, 1611, 1612, 1619, ZS–0146, 2603, and 2604.[3] The court found export value, as defined in section 402(b), Tariff Act of 1930, as amended, supra, to be the proper basis for valuation of those items. The appellate term in affirming the judgment of the trial court adopted and incorporated by reference the findings of fact and conclusions of law of the lower court. (70 Cust. Ct. 286, 295, A.R.D. 313.)

Defendant argues there is a difference in merchandise and time of importation in the incorporated case and in the case now before the court. The court agrees with defendant's position that the incorporated case cannot be stare decisis of the issue.

In the case at bar defendant contends the imported merchandise belongs to a class of articles which is chiefly used as laboratory instruments for purposes of experiment or study and was properly appraised

[3] Audio frequency response and spectrum recorder; audio frequency spectrum recorders; audio frequency spectrometers; 1/3 octave filter sets; extension filter set; filter chassis; microphone amplifiers.

on the basis of foreign value as defined in section 402a(c), supra, by virtue of enumeration on the final list.

Although the classification of the imported merchandise is not in issue, determination of whether an article comes within the final list enumeration is dependent in large part upon the classification status under the Tariff Schedules of the United States and the rules of construction applicable thereto. In ascertaining whether an article comes within the final list description, this court and the appeals court have been guided by its tariff classification. *National Carloading Corporation* v. *United States*, 53 CCPA 57, C.A.D. 877 (1966).

Plaintiff contends that whether or not a particular imported article is specified on the final list is not based upon the use in the United States of competitive domestic articles of the same class or kind. The uses in the United States, plaintiff contends, of domestically produced sound level meters and octave filter sets are not pertinent to the question of whether articles imported from Denmark, having a high degree of accuracy, are chiefly used in this country for laboratory purposes related to experiment and study. Plaintiff further alleges the imported instruments are not laboratory instruments or parts thereof within the meaning of the final list if the particular imported articles are suitable for supplemental use in a laboratory, but are chiefly used throughout the United States at the time of importation for practical commercial applications as distinct from the purposes of laboratory testing for experiment and study. Plaintiff contends inter alia the evidence establishes these particular instruments were chiefly used throughout the United States during the period in issue for practical commercial applications rather than for laboratory testing for experiment and study. It is also alleged the written material furnished by defendant's witnesses indicate competitive domestic articles, claimed by defendant to be of the same class or kind, were chiefly used throughout the United States during the time period involved for practical commercial applications.

In support of its position plaintiff cites the following cases wherein the courts based their determination as to whether the items in controversy were, or were not, "laboratory instruments" upon the question of whether the particular articles were chiefly used in a laboratory without reference to other articles of the same class or kind: *United States* v. *Dyson Shipping Co.*, 27 CCPA 260, C.A.D. 96 (1940); *Davies Turner & Co.* v. *United States*, 40 Cust. Ct. 439, 441, Abs. 61536 (1958); *Federal Electric Products Co.* v. *United States*, 35 Cust. Ct. 47, C.D. 1720 (1955); *Davies Turner & Co. et al.* v. *United States*, 29 Cust. Ct. 248, C.D. 1477 (1952); *Brabender Corp. et al.* v. *United States*, 8 Cust. Ct. 267, C.D. 619 (1942); *Cambosco Scientific Co.* v.

United States, 8 Cust. Ct. 191, C.D. 601 (1942); and *Arthur H. Thomas Co.* v. *United States*, 72 Treas. Dec. 203, T.D. 49102 (1937).

The opinion of the appellate term in the case of *The A. W. Fenton Co., Inc.* v. *United States*, 70 Cust. Ct. 286, 289, A.R.D. 313 (1973), aff'g 67 Cust. Ct. 519, R.D. 11755 (1951), is pertinent to the issues now before this court. The appellate term stated:

> In its opinion the trial court noted that, absent any published guide as to the meaning and scope of the final list term, "Instruments and parts, laboratory, sound measuring", it would be appropriate to utilize, insofar as possible, the long settled rules applicable to the classification of "laboratory instruments". The court stated (67 Cust. Ct. 521–22):
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> > The term "laboratory instruments" has been construed as implying use for laboratory purposes. *R. J. Saunders & Co., Inc.* v. *United States*, 45 CCPA 87, C.A.D. 678 (1958); the Customs Court has indicated that "laboratory purposes" refers to use for experiment or study. *Westinghouse Electric Corporation* v. *United States*, 55 Cust. Ct. 271, C.D. 2589 (1965); *The A. W. Fenton Co., Inc.* v. *United States*, 49 Cust. Ct. 242, Abstract 67085 (1962). This court's construction of the term was noted without comment by the court of appeals without disturbing the same in *J. J. Boll, et al.* v. *United States*, 55 CCPA 86, 88, C.A.D. 937 (1968), and it appears to be a precedent of this court. The controlling consideration is therefore not the place where the merchandise was used but the purpose for which it was used. *Schick X-Ray Co., Inc.* v. *United States*, 62 Cust. Ct. 97, C.D. 3689, 295 F. Supp. 302 (1969).
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> > Furthermore, as the term in issue has been held to be a "use" provision, classification thereunder is predicated upon a finding that the merchandise was chiefly used for laboratory purposes. In challenging the finding, it is plaintiff's burden to establish the contrary by competent evidence. *Schick X-Ray Co., Inc.* v. *United States, supra; J. E. Bernard & Co., Inc.* v. *United States*, 44 Cust. Ct. 315, Abstract 63712 (1960).
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> > As the appraiser's finding of value is presumptively correct, 28 U.S.C. § 2633, plaintiff has assumed the burden of establishing either (1) that the analyses and recording instruments are not chiefly used for laboratory purposes, or (2) that all of the articles at bar are not sound measuring instruments within the meaning of the Final List.

The appellate term then stated at page 294:

> It is well settled that the actual use to which the importation is put is not controlling as to its chief use. *E. Dillingham, Inc.* v. *United States*, 54 CCPA 121, C.A.D. 922 (1967). Nor is testimony as to the use of the identical merchandise produced by the same importer sufficient: it is the use of the particular *class or type* of goods as a whole that is controlling. *Western Importing Company*

v. *United States*, 62 Cust. Ct. 231, 297 F. Supp. 181, C.D. 3734 (1969); *Atkinson, Haserick & Co., Inc.* v. *United States*, 52 Cust. Ct. 215, C.D. 2463 (1964). In this aspect of the case the record is totally devoid of any testimony as to the uses of competitive articles of the same class or kind as that involved herein during the period in issue.

To sustain its burden of proof in the case at bar, plaintiff must establish that the imported articles are not laboratory instruments or parts of laboratory instruments, i.e., those used for laboratory purposes. In *Applied Research Laboratories, Inc.* v. *United States*, 65 Cust. Ct. 505, 508, C.D. 4129 (1970), the court in reviewing the "laboratory purposes" stated:

> And this court has determined that "laboratory purposes" refer to use for experiment or study. *Thornley & Pitt, Misco, Inc.* v. *United States*, 58 Cust. Ct. 178, C.D. 2926, 266 F. Supp. 350 (1967); *The A. W. Fenton Co., Inc.* v. *United States*, 49 Cust. Ct. 242, Abstract 67085 (1962).

The defendant, in support of its position that chief use is determined on the basis of the chief use of a particular class or kind of article as a whole and not on the use of imported merchandise alone, cites among other authorities General Interpretative Rule 10(e)(i) of TSUS.[4]

Plaintiff's position is rule 10(e)(i) does not apply in the case at bar inasmuch as (1) the imported instruments were not classified under TSUS as laboratory instruments, and (2) that there is a congressional mandate that the aforesaid rule is to be used only for "the purposes of these schedules," and the question of whether or not the instruments in issue are to be used for laboratory purposes must, therefore, be predicated upon how the use or chief use provision of the final list was interpreted as of the time when the final list was enacted.

The court agrees that rule 10(e)(i) is not applicable to the case at bar. The test of chief use in effect prior to the tariff schedules is controlling. Chief use under the Tariff Act of 1930 was, however, basically the same as under TSUS. Such use was determined on the basis of the chief use of that class or kind of article at the time of importation throughout the United States, and not on the use of the imported merchandise. *E. Dillingham, Inc.* v. *United States*, 54 CCPA 121, C.A.D. 922 (1967); Sturm, *A Manual of Customs Law* (1974),

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[4] General Interpretative Rule 10(e)(i) provides:

10. *General Interpretative Rules.*—For the purposes of these schedules—

* * * * * * *

(e) in the absence of special language or context which otherwise requires—

(i) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined.

p. 222. In order to prevail plaintiff must establish the chief use of the particular class of merchandise and that the importations themselves actually belong to that class. *Maher-App & Co., et al.* v. *United States*, 57 CCPA 31, C.A.D. 973, 418 F. 2d 922 (1969).

Mr. James W. Day, president and general manager of B. & K. Instruments, Inc., from 1958 to 1972, testified for plaintiff. He also executed an affidavit on August 15, 1975, which amplified his testimony at the trial. (Exhibit 4.) Mr. Day had been a witness in *The A. W. Fenton Co., Inc.* v. *United States*, *supra*, the record of which is incorporated herein. He was also a witness in *The A. W. Fenton Co., Inc.* v. *United States*, 49 Cust. Ct. 242, Abs. 67085 (1962). Mr. Day testified that his company imports and markets instruments which are manufactured by Bruel & Kjaer of Denmark, including the subject articles. He said that he had sold B. & K. instruments in all of the States in the United States, his company being the exclusive U.S. importer and purchaser of Bruel & Kjaer instruments.

The witness stated he was familiar with the imported models 2203, 2204, and 1613, and the nature, functions, operations, uses, and purposes for which they were designed and used. He testified he had used those three instruments extensively and had seen others use them in their places of business and in the field.

Model 2203 was described as a sound level meter consisting of a sensor microphone, which operates on a capacitance principle that converts the sound pressure to an electrical signal. The signal is then amplified so that a meter can indicate the level of the sound measurement on a calibrated scale. Mr. Day said he had used that instrument several thousand times and had seen others use it 300 or more times.

The witness testified that model 2203 was used for practical commercial applications of measuring sound as it pertains to the health and welfare of people and for the calibration of audiometers. Mr. Day said it was largely used for measurement of sound in the field to establish if certain machinery met a criteria that had been set by either the customers or the manufacturers.

Model 2204 was described as a sound level meter comprising a condenser microphone, a sensor to convert the sound pressure to an electrical signal, and the electronic amplifier to increase the amount of the electrical signal so that a meter can register the pressure impinging on the microphone. The witness characterized models 2203 and 2204 as miniaturized versions of the microphone amplifiers in the incorporated case, *The A. W. Fenton Co., Inc.* v. *United States*, 67 Cust. Ct. 519, R.D. 11755 (1971), *aff'd*, 70 Cust. Ct. 286, A.R.D. 313 (1973). It is noted in that case the microphone amplifiers were held chiefly to be used for nonlaboratory purposes.

Model 1613, an octave filter set or combination of filters in a single

package designed solely to be attached to either model 2203 or 2204 sound level meter, was according to the witness a miniaturized version of the models 1611 and 1612 filter sets which were before the court in the incorporated case. In *The A. W. Fenton* case (R.D. 11755) plaintiff had established prima facie that models 1611 and 1612 were chiefly used by the Government and private companies in practical, commercial applications such as quality control, preventive maintenance, incoming inspection, and establishment of specifications for commercial products and not in experiment or research. Defendant therein offered no evidence, nor was there anything of record to refute or contradict that aspect of testimony.

Mr. Day also testified that he had sold the instruments in issue to industrial hygienists and safety engineers of industry, the military, accoustical consultants, national, State, and city health departments, insurance companies, sound system installations, speech, hearing centers, otologists and otolaryngologists, and for quality control.

Gunnar Rasmussen, plaintiff's rebuttal witness who worked on the B. & K. models 2203 and 2204 sound level meters and developed a microphone used with those meters, said the three instruments were specifically designed for falling outside the class of articles that he recognized as laboratory instruments.

William C. Sperry,[5] who testified for defendant, said he had used the B. & K. 2203 sound level meter and the 1613 octave filter sets in General Electric's laboratory. For the most part they were used for field measurements and experiments, the results of which were analyzed at Mr. Sperry's direction. Material provided by the analysis would invariably go into a report, which would discuss the problem and its solutions and include recommendations. Mr. Sperry considered that type of work to be research laboratory work. While working for the Federal Aviation Administration, he had observed, on some occasions, models 2203 and 1613 in programs of applied research and demonstration, both in a fixed laboratory and in a field laboratory, and had seen them used in measuring aircraft noise and in measuring components of aircraft engine noise.

Defendant proffered the testimony of Anthony W. Paolillo, a professional engineer in charge of the New York City Transit Authority's Environmental Staff Division (formerly the Sound and Vibration Analysis and Control Group). The witness testified his group investigated problems of noise and vibration in the transit system during the period in issue. Mr. Paolillo considered the B. & K. 2203 to be both a satisfactory field testing instrument and a satisfactory

[5] During the relevant time period Mr. Sperry said he had worked for the Illinois Institute of Technology, Research Institute, a contract research laboratory involved in ultrasonic and psychoacoustics work but mostly noise control; General Electric; and the Federal Aviation Administration.

laboratory instrument. He said he could have used the 2203 and the 1613 or the 2204 and the 1613 in a fixed area, which he described as a laboratory in his operation.

From the foregoing evidence, it is concluded that the importations either were or could be utilized for both laboratory and practical commercial purposes. In the case at bar we are not concerned with use of the importations as such but with chief use of the particular class or type of goods. *E. Dillingham, Inc.* v. *United States, supra; The A. W. Fenton Co., Inc.* v. *United States, supra.*

In order to determine whether the importations herein belong to the particular class or kind of sound measuring and related instruments, a review of the factors found by the court to be pertinent must be considered. Such factors include the general physical characteristics of the merchandise, the expectation of the ultimate purchasers, the channels, class or kind of trade in which the merchandise moves, the environment of the sale (i.e., accompanying accessories and the manner in which the merchandise is advertised and displayed), the use, if any, in the same manner as merchandise which defines the class, the economic practicality of so using the import, and the recognition in the trade of this use. Susceptability, capability, adequacy, or adaptability of the import to the common use of the class is not controlling. *United States* v. *The Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373 (1976), cert. denied, 429 U.S. 979 (1976); *Pistorino & Company, Inc.* v. *United States*, 81 Cust. Ct. 106, C.D. 4774 (1978).

Based upon the testimony of Dr. Peterson and Mr. Paolillo it has been established that during the relevant time period, instruments manufactured by American companies were used for the same purposes, were competitive with and met the same standards as the imported B. & K. sound level meters and octave filter sets.

According to Dr. Peterson, General Radio sound level meters and the octave-band analyzer were sold throughout the United States. The sound level meters were sold in competition with the B. & K. sound level meters. The octave-band analyzer was sold in combination with B. & K.'s sound level meters and octave filter sets. The witness considered his company's sound level meters (1551C, 1565A, and 1561) to be of the same class or kind of instrument as the B. & K. sound level meters. All met the same relevant U.S. standards. Dr. Peterson considered the combination of the General Radio 1558 octave-band noise analyzer and its 1551C sound level meter to be the same class or kind of instruments and performing the same function as the combination of the B. & K. 2203 and 1613. He stated that Hewlett-Packard, Columbia Research, and H. H. Scott produced sound level meters and were competing for the same customers.

Mr. Paolillo testified that prior to purchasing equipment to investigate noise and vibration in the transit system, his group gave consideration to instruments manufactured by General Radio, B. & K., and H. H. Scott. The General Radio model 1551C sound level meter was among the instruments purchased. The witness stated the 1551C and B. & K. 2203 were alternative choices. The price was very close, the instruments were equally suitable, and both met the American standards and performed the same function. The group additionally acquired another model of General Radio sound level meter and a B. & K. package, which included a 2204 sound level meter, as well as a 1613 octave filter set. Mr. Paolillo said all met the standards applicable during the related period.

Mr. Rasmussen testified he was personally familiar with all of the sound meters produced by General Radio Co., Columbia Research Co., and H. H. Scott Co., as he was required to know the competitive market situation. He had seen them at exhibitions, trade shows and technical seminars in the United States. In the witness' opinion the General Radio 1551C sound level meters were of the same capabilities as the 2203, 2204, and 1613. There were differences in that the B. & K. instruments and those of General Radio did not have the same reproducibility. The witness did not regard General Radio's 1551C sound level meter to be as satisfactory as the 2203, 2204, and 1613. The B. & K. models were not suitable for indoor mountings, as they were hand-held and more suitable for practical field use. Mr. Rasmussen conceded that conditions could exist where the B. & K. 2203 and General Radio 1551C would come very close to each other. He said the 1551C, as well as the 2203 and 2204, met the applicable standard for the sound level meters in effect during the related time period. The witness testified that the B. & K. 2603 was comparable to the General Radio 1561 instrument but the B. & K. 2203, 2204, and 1613 were more suitable for practical field uses as they were hand-held.

There are no samples of the importations before the court. Nor are there samples of domestic instruments. In evidence, however, are advertisements which illustrate and describe the instruments. They are supportive of testimony proffered by Dr. Peterson and Mr. Paolillo on the issue of class or kind. B. & K. models 2203, 2204, and 1613 are shown to be hand-held, compact, lightweight, and battery operated.[6] General Radio's catalog S (exhibit F–1) describes its 1551C sound level meter as compact and portable, weighing less than 8 pounds with battery; the 1565A sound level meter as pocket sized

[6] Exhibit A–1 illustrates B. & K. model 2203 sound level meter with model 1613 octave filter set as hand-held and describes it as compact, lightweight, and battery operated. Exhibit A–3 illustrates B. & K. model 2204 sound level meter as hand-held and describes it as being "in a portable, battery-operated, hand-held package."

and lightweight (1¾ pounds), powered by a single 1.5 volt C cell; and the 1558 octave-band noise analyzer as small, compact, and portable, weighing less than 9 pounds and battery operated.

The record establishes the imported sound level meters and the octave filter sets, which were designed solely for use with the meters, were used to measure sound, for calibration, and for research and accumulation of data to establish noise standards. The domestic General Radio sound level meters and analyzer were used basically to measure and analyze sound. The ultimate purchasers of both the imported and domestic instruments were industry, government, the military, educational and research institutions, and acoustical consultants. Testimony had been elicited that Hewlett-Packard, Columbia Research, and H. H. Scott produced sound level meters and were competing for the same customers.

It is clear from the evidence of record that the importations and the domestic instruments were used to measure sound. In some instances the results of such measurement were utilized for commercial purposes. In others, information obtained in the field was essential for laboratory purposes, i.e., for experiment and study. The two kinds of merchandise were sold to the same class of purchasers.

In *The Golding-Keene Company et al.* v. *United States* (*E. Dillingham, Inc., a/c Rheem Mfg. Co., Party in Interest*), 44 Cust. Ct. 169, C.D. 2172, 183 F. Supp. 947 (1960), *aff'd*, 48 CCPA 66, C.A.D. 766 (1961), the trial court held the phrase as found in section 516(b), Tariff Act of 1930, as amended, did not require the imported merchandise to be identical with the product of the domestic producers. The record therein included evidence to the effect that the two kinds of merchandise were sold to the same class of purchasers and were used for the same purpose.

In the case at bar it is clear from the testimony and the exhibits that the importations while not identical to the domestic instruments are basically used for the same purposes and are sold to the same class of purchasers. The court, therefore, concludes that the importations are of the same class or kind as the domestic sound measuring instruments.

The basis of appraisement herein was predicated upon a finding that the merchandise was chiefly used for laboratory purposes within the purview of the final list designation. As the Customs officials' finding of value is presumptively correct (28 U.S.C. § 2635(a)), plaintiff has the burden of establishing that instruments of the same class or kind are not chiefly used for laboratory purposes. Chief use must be predicated upon evidence which is representative of an adequate cross section of the country, *L. Tobert Co., Inc., et al.* v. *United States*, 41 CCPA 161, C.A.D. 544 (1953), with respect to use by users, as a

whole, of the particular type of commodity involved and not upon the actual individual use of a particular shipment in issue, *United States* v. *Spreckels Creameries, Inc.*, 17 CCPA 400, T.D. 43835 (1930).

The record establishes that merchandise of the class or kind to which the imported merchandise belongs is used for both laboratory (research and study) and nonlaboratory (commercial) purposes. Accordingly, plaintiff has failed to overcome the presumption of correctness attaching to the appraisement.

In view of the foregoing and on the record before it, the court makes the following findings of fact and conclusions of law:

Findings of fact

1. That the merchandise of the reappraisement appeals herein consists of sound level meters, models 2203 and 2204, and model 1613 octave filter sets, exported from Denmark by Bruel & Kjaer and entered at the port of Cleveland, Ohio.

2. That B. & K. Instruments, Inc., the plaintiff-importer of record, and Bruel & Kjaer, the exporter, were at the time of exportation related persons within the meaning of section 402(g) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956.

3. That the importations are conceded to be sound measuring instruments or parts thereof.

4. That the involved merchandise was found to be on the final list issued by the Secretary of the Treasury, T.D. 54521, under the provision for "Instruments and parts, laboratory, sound measuring."

5. That the articles were appraised on the basis of foreign value, as defined in section 402a(c), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, at the invoiced unit prices, net, packed, plus 29.03 percent.

6. That plaintiff has failed to establish that the imported items of merchandise are of a class or kind which are not chiefly used for laboratory purposes and, hence, not within the final list designation.

Conclusions of law

1. That foreign value, as that value is defined in section 402a(c) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956, is the proper basis for appraisement of the merchandise here involved.

2. That the presumption of correctness attaching to the customs officials' valuations of the merchandise in question has not been overcome.

3. That the foreign value for the merchandise herein is represented by the appraised values.

Judgment will be entered accordingly.

(C.D. 4804)

SWIFT INSTRUMENTS, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT.	Court No. 72–1–00119

Microscope cases

IMPORTED WITH PARTS—SOLD WITH COMPLETE ARTICLES—SEPARATE CLASSIFICATION

Microscope cases imported from Japan in same shipments with frames, mountings and other microscope parts and classified in liquidation pursuant to headnote 2, TSUS schedule 7, part 2, with said articles under TSUS item 708.80, *Held*, properly classifiable separately as claimed as microscope cases lined with textile fabric under TSUS item 204.50 where the established facts disclose that the cases are ordinarily sold at retail with complete microscopes and not with the parts with which the cases were imported, and where the partial lining in the cases is functional and, hence, is not *de minimis* or insignificant.

[Judgment for plaintiff.]

(Decided May 22, 1979)

Glad, Tuttle & White (*Stephen S. Spraitzar* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation; *Susan C. Cassell*, trial attorney), for the defendant.

RICHARDSON, Judge: This action is submitted for decision upon a merchandise sample which consists of wood microscope cases of Japanese origin, imported through the port of San Francisco, Calif., between April 1966, and December 1968, in the same shipments with frames, mountings, and other parts of microscopes of like origin; and a stipulation that the imported cases are approximately 18½ inches high, 10¾ inches wide, and 14¼ inches long. It is also stipulated that the cases (1) are in chief value of wood, (2) are ordinarily sold at retail with a complete microscope, (3) are not ordinarily sold at retail with frames, mountings, and parts thereof of the character with which they are imported, (4) are partially lined with a textile material which is approximately 20 inches long and 3¼ inches high located at the rear of the case, (5) that the purpose of the lining is to provide a good fitting of the microscope in the case, to prevent the scratching of the microscope by the case, and to preserve the cosmetic appearance of the microscope, and (6) that the total surface area inside the

microscope case is approximately 1,102.5 square inches, and the textile lining inside the microscope case covers approximately 65 square inches.

Upon importation the merchandise, including the cases in dispute, was classified in liquidation pursuant to headnote 2 of TSUS schedule 7, part 2, under the provision in item 708.80 for "Frames and mountings, and parts thereof: For compound optical microscopes" at the duty rate of 30 or 27 per centum ad valorem, depending upon date of entry. Headnote 2, supra, provides, "Cases, boxes, and containers of types ordinarily sold at retail with the instruments or other articles provided for in this part are classifiable with such articles if imported therewith."

Plaintiff claims that the cases are properly classifiable under TSUS item 204.50 as modified by T.D. 68–9 as microscope cases lined with textile fabrics at the duty rate of 2 cents per pound plus 5 per centum ad valorem or 2 cents per pound plus 4.5 per centum ad valorem, depending upon date of entry. Alternatively,* plaintiff claims that the cases should be classified under TSUS item 204.40 as microscope cases not line with textile fabrics at the duty rate of 16⅔ per centum ad valorem.

Plaintiff contends that the imported cases are not classifiable under item 708.80 because they are not ordinarily sold at retail with the articles with which they were imported. Plaintiff argues, "Headnote 2 is intended to classify the cases which are so closely associated with the instruments or articles, under the provision providing for these instruments or articles if the cases are imported with these instruments." (brief, p. 13) Defendant contends that headnote 2 mandates that microscope cases imported with frames and mountings provided for in item 708.80 be classified therewith. Defendant argues, "It is undisputed that these cases are 'ordinarily sold at retail' with with complete microscopes [stipulation, para. 8], and that the frames and mountings imported with these cases were assembled into the very microscopes which were sold at retail with the imported cases [complaint, para. 9]." (brief, p. 6)

Plaintiff further contends that the cases are "lined" within the meaning of item 204.50. Plaintiff argues that "item 204.50 encompasses partially lined microscope cases as well as completely lined cases." (brief, p. 16) Defendant contends, in the event the court determines the classification of the cases to be erroneous, that the cases are classifiable under item 204.40, and not 204.50. Defendant argues, "it is clear that the textile fabric contained in the microscope

*Plaintiff's primary and alternative claims were set up in reverse order in the complaint. Also, a second alternative claim in the complaint for classification of the cases under TSUS Item 207.00 has been abandoned.

cases is insufficient, as a matter of law, to render the importation 'lined,' for tariff purposes * * *." (brief, p. 8)

The court agrees with plaintiff. The wood microscope cases should not have been classified under item 708.80 under the facts of record since the associated articles classifiable thereunder, i.e., frames, mountings, and other microscope parts, are incompatible with the imported cases, and, admittedly, are not sold at retail with these cases. The court reads headnote 2, supra, as requiring compatibility between the imported cases and instruments or other articles as of the time of importation in order for the headnote to control classification of the cases.

Classification of imported merchandise not governed by use must be determined on the basis of the condition of the merchandise at the time of importation. *Leonard Levin Co.* v. *United States*, 27 CCPA 101, C.A.D. 69 (1939). Admittedly, at the time of importation of the disputed cases the associated articles imported therewith were not microscopes—the only articles with which the subject cases are compatible and with which they are ordinarily sold at retail. And it is only when these associated articles are assembled with other components after importation that the resulting microscopes acquire compatibility with the cases. That post-importation considerations were not intended by the framers of headnote 2, supra, to be the occasion for its application is reflected in the draftsman's notes by way of reference to the microscope as an exemplar, wherein it is stated:

> * * * Many articles such as microscopes are ordinarily sold with a case of wood or other material which not only provides protection for the instrument during transportation but also in the laboratory or elsewhere when the instrument is not in use. These cases, which are usually of special design, are so closely associated with the instrument that they should be classifiable therewith if imported with such instruments. [*Tariff Classification Study, Schedule 7*, p. 139 (1960).]

As for the matter of the textile lining, the court is of the opinion that the disputed cases are "lined" within the meaning of item 204.50. There is nothing in the provision which prescribes the quantum of lining a case must possess in order to be deemed "lined" for classification purposes. Consequently, each issue presented under the provision must be judged on the basis of its own peculiar facts.

An inspection of the interior of the sample case (joint exhibit A) indicates that practical considerations dictated that the 65 square inches of lining inside the case were considered adequate to achieve the goals of (1) providing a good fitting of scope to case, (2) the avoidance of scratches on the scope from the case, and (3) the preservation of the cosmetic appearance of the scope. At the base there are built-in wood inserts arranged in a horseshoe configuration of ap-

proximately 20 inches in length and 3¼ inches in height. It is this horseshoe configuration which received the lining, undoubtedly for the purpose of accommodating the horseshoe-shaped base of the scope in a snug fit. And since not all parts of a microscope are likely to come into contact with the case, placement of the lining elsewhere in the interior would appear to be superfluous.

In any case, the upper portion of the case interior of joint exhibit A is equipped with offsetting wood structural inserts (top) and metal guide rails (sides), the obvious purpose of which would appear to be the promotion of stability of the upper portion of the microscope through minimization of movement in the case. Additionally, against the interior of the hinged door of the case round rubber cushions have been cemented to facilitate stabilization of the scope when in the case. All in all, the case appears to have been precision-built to house a particular shaped microscope; and, in view of the concession that the microscopes are ordinarily sold with these cases, the court infers that the avowed goals of the partial lining have in fact been achieved.

The partial lining, which comprises approximately 5.9 percent of the total inside surface of the case, is clearly functional, and, therefore, cannot be deemed de minimis or insignificant, notwithstanding the fact that the case is not fully lined. See and compare, *Bemis Bro. Bag Co.* v. *United States*, 11 Ct. Cust. Appls. 373, T.D. 39162 (1922), wherein colored fabric comprising only 3 percent of the surface area was held sufficient to sustain classification of the fabric as "colored" as opposed to "uncolored". The record supports classification of the cases under item 204.50 as claimed.

Judgment will be entered herein accordingly.

Decisions of the United States Customs Court

Abstracts

Abstracted Protest Decisions

DEPARTMENT OF THE TREASURY, *May 29, 1979.*

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to Customs officials in easily locating cases and tracing important facts.

ROBERT E. CHASEN,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/85	Maletz, J. May 25, 1979	Adolco Trading Corp.	77-7-01201	Item 948.00 10% additional duty pursuant to Pres. Proc. 4074	Merchandise exempt from assessment of supplemental duty under item 948.00, pursuant to Treas. Dept. Order No. 3, T.D. 71-232	Agreed statement of facts	New York Supplemental duty

P79/86	Boe, J. May 25, 1979	John S. Connor, Inc. for the account of Clairol, Inc.	77–2–00221, etc.	Items 544.51/ 807.00 17.5% upon full value of merchandise less cost or value of prefabricated U.S. manufactured components Item 544.51 17.5% upon full value of merchandise	Item 688.40/ 807.00 5.5% upon full value of imported merchandise less cost or value of prefabricated U.S. manufactured components contained in models [C]LM2, [C]LM3, and [C]LM5 which were found applicable upon liquidation of merchandise; and upon full value of imported merchandise less cost or value ($1.45224 and $1.86147 each, respectively) of prefabricated U.S. manufactured components contained in models LM1 and LM6 imported in 1972	The Englishtown Corporation v. U.S. (C.A.D. 1187)	Baltimore American goods returned; electrical makeup appliances incorporating mirrors, lights and other features (models [C]LM2, [C]LM3, [C]LM5, LM1 and LM6.
P79/87	Boe, J. May 25, 1979	EM Laboratories, Inc.	78–10–01884	Item 547.55 21%	Item 711.88 11%	E. M. Laboratories, Inc. v. U.S. (C.D. 4744)	New York Thin layer chromatography plates

294–262—79——11

Decisions of the United States Customs Court

Abstracts

Abstracted Reappraisement Decisions

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/84	Maletz, J. May 23, 1979	Astra Trading Corp.	R59/17326, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Binoculars
R79/85	Maletz, J. May 23, 1979	J. E. Bernard & Co., Inc.	R65/7203, etc.	United States value	F.o.b. unit invoice prices plus 50%	Agreed statement of facts	Chicago Electron receiving tubes
R79/86	Maletz, J. May 23, 1979	National Silver Co.	R68/11188, etc.	Export value	Appraised value less 7.5% net packed	Agreed statement of facts	Los Angeles Stainless steel flatware

Appeal to U.S. Court of Customs and Patent Appeals

APPEAL 79–23.—Pharmacia Laboratories Inc. *v.* United States.—RADIOIMMUNOASSAY TESTING KITS—OTHER ARTICLES NOT PROVIDED FOR ELSEWHERE IN TARIFF SCHEDULES—CHEMICAL COMPOUNDS WHICH ARE USEFULLY RADIOACTIVE—TSUS. Appeal from C.D. 4798.

In this case four types of radioimmunoassay diagnostic testing kits, used to detect the presence of certain chemicals in blood serum, were classified under the provision in item 799.00 Tariff Schedules of the United States, as modified by T.D. 68–9, for other articles not provided for elsewhere in the tariff schedules and were assessed with duty at the rate of 6 or 5 percent ad valorem, depending upon the date of entry. Some of the entries were classified under item 429.95, 432.00, or 439.50; defendant (appellee) conceded the error of these classifications and requested judgment without their affirmance. Plaintiff (appellant) claimed that the kits were properly classifiable under item 494.50 as chemical compounds which are usefully radioactive and should therefore be free of duty. The Customs Court found that the kits were too diverse in their contents to be properly described by the claimed provision, and judgment was entered for the defendant. The classifications under provisions other than item 799.00 were not affirmed.

It is claimed that the Customs Court erred in finding and holding that the imported articles are not classifiable under the provisions of item 494.50, supra, and in dismissing the action; in finding and holding that in its imported form each kit involved is not adequately or specifically described, in its entirety, as a usefully radioactive compound; in finding and holding that the kits are too diverse in their contents to be properly described by the claimed provision, item 494.50; in finding and holding that the claimed provision cannot be interpreted to cover the importation; in not finding and holding that the purchase, sale, and disposal of the kits are under the control of the Nuclear Regulatory Commission; in not finding and holding that such control by the Nuclear Regulatory Commission mandates the conclusion that each kit involved herein is a single item of commerce under item 494.50; in not finding and holding that the kits involved herein are properly classifiable under the provisions of item 494.50, TSUS, free of duty.

International Trade Commission Notices

Investigations by the U.S. International Trade Commission

DEPARTMENT OF THE TREASURY

The appended notices relating to investigations by the U.S. International Trade Commission are published for the information of Customs Officers and others concerned.

R. E. CHASEN,
Commissioner of Customs.

In the matter of
CERTAIN CATTLE WHIPS } Investigation No. 337–TA–57

Opportunity for Public Comment on Proposed Consent Order Agreement

Notice is hereby given that the presiding officer in the above-captioned investigation has certified to the Commission for appropriate action a joint motion to terminate the investigation along with a consent order agreement signed by all the parties to the investigation. The investigation is being conducted pursuant to section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337). The motion was docketed as motion 57–10. Provision is made for the filing of such motions and agreements in section 210.51(a) of the Commission's Rules of Practice and Procedure (19 CFR 210.51(a)).

The proposed consent order agreement directs that respondent Skyline Imports, Ltd., will not export certain whips to, and respondent Action Co. will not import certain whips into, the United States, and that Skyline will discontinue designating its whips as "No. 30 whips". Compliance with the agreement would be required after January 15, 1979, and until expiration of complainant's U.S. Letters Patent 3,356,294 on December 5, 1984, or until such time as the patent is held invalid by a final decision of a tribunal with competent jurisdic-

tion. The agreement provides that respondents Skyline and Action will voluntarily submit to the Commission's jurisdiction; that respondents Skyline and Action and complainant Stockmen's, Inc., waive (1) further procedural requirements, including the requirement that the Commission make a determination under 19 U.S.C. 1337(c), (2) judicial review of the consent order, (3) the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law, and (4) any other challenge or contest to the validity of the consent order; and that once the order has been issued, Skyline and Action will be required to file one or more compliance reports. The agreement also provides that violation of the order may result in proceedings before the Commission to determine what, if any, sanction pursuant to 19 U.S.C. 1337 should be applied to such violation.

A copy of the proposed agreement is set forth below. Any interested member of the public is invited to submit written comments regarding the agreement. Such comments should be addressed to the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, and should be received not later than 30 days after the publication of this notice in the Federal Register.

No public hearing before the Commission regarding this motion and agreement is contemplated at this time. The Commission will give consideration to requests for such a hearing if such requests are received not later than 10 days after publication of this notice in the Federal Register.

Notice of institution of the investigation was published in the Federal Register of August 9, 1979 (43 F.R. 35398).

By order of the Commission.

Issued: May 30, 1979.

KENNETH R. MASON,
Secretary.

In the Matter of
CERTAIN CATTLE WHIPS } Investigation No. 337–TA–57

Consent Order Agreement

The U.S. International Trade Commission having instituted, upon complaint of Stockmen's, an investigation, pursuant to its notice of investigation, issued August 4, 1978, of certain acts and practices of Skyline and Action in the exportation and importation of cattle whips to the United States, respectively, and it now appearing that Skyline, Stockmen's, and the Commission investigative attorney are willing to enter into an agreement containing an order to cease and desist

from the acts and practices specified in the consent order incorporated herein.

It is hereby agreed by and between Skyline and Action, by its duly appointed officers; and Stockmen's by its duly appointed officers; and the Commission investigative attorney, Robert M. M. Seto, that:

I. For the purpose of this consent order agreement and the enforcement hereof, Skyline, and Action having appeared and voluntarily submitted to the personal jurisdiction of the Commission by agreeing to this consent order agreement, admits that the Commission has jurisdiction over the subject matter included in the August 4, 1978, notice of investigation.

II. This consent order agreement is for settlement purposes only and does not constitute a finding by the Commission or an admission by Skyline and Action that section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337) or any other statute or regulation, has been violated.

III. Skyline, Action, and Stockmen's, and the Commission investigative attorney, in agreeing to the entry of this consent order, waive (1) further procedural requirements, including the requirement that the Commission make a determination under section 337(c) of the Tariff Act of 1930, as amended (19 U.S.C. 1337(c)), (2) judicial review of this consent order, (3) the requirement that the Commission's decision contain a statement of findings of fact and conclusion of law, and (4) any other challenge or contest to the validity of this consent order.

IV. This consent order agreement contemplates that, if it is finally accepted by the Commission, the Commission may, without further notice to Skyline, Action, or Stockmen's, (1) issue its decision containing the following order to cease and desist in disposition of this investigation, and (2) make public information which is not "business confidential" as that term is defined in section 201.6 of the Commission's Rules of Practice and Procedure.

V. Skyline and Action have read the order contemplated hereby, and they understand that once the order has been issued, they will be required to file one or more compliance reports as therein specified, and that violation of the order may result in proceedings before the Commission to determine what, if any, sanction should be applied to such violation including a possible order of exclusion from entry pursuant to 19 U.S.C. 1337(d).

ORDER

It is ordered that—

I

Subsequent to January 15, 1979, and until expiration to the Henry

patent '294 on December 5, 1984, or until such time as the patent is held invalid by a final decision of a tribunal with competent jurisdiction, all whips exported by Skyline or any affiliated company, or imported by Action or any affiliated company, into the United States shall not have any portion of the inverted section of the braid cover extend over the terminal end of the whip shaft. Moreover, Skyline agrees to discontinue designating its whips as "No. 30 whips." This agreement settles the entire controversy between the parties relating to this subject matter.

II

Skyline and Action, by their chief executive officers, shall each file a properly notarized affidavit covering the period from the date this order becomes final through August 15, 1979, containing therein a detailed statement describing the extent of compliance with this consent order agreement. Each affidavit and report shall be filed with the Commission by August 31, 1979. If Skyline or Action fails to file its report as required or if the Commission has sufficient reason to believe, on the basis of the foregoing report, that the terms of this order have been violated, the Commission reserves the rights to require such additional reports as are deemed necessary.

III

The reporting requirement of paragraph II of this order will be reviewed by the Commission after the report due in 1979 is received in order to ascertain whether further reporting by Skyline or Action is necessary, as provided in paragraph II.

IV

For the purpose of securing compliance with this order and during the period ending December 31, 1979, or any further period of reporting resulting from a determination by the Commission that it has sufficient reason to believe that Skyline or Action is in violation of this order or has failed to file its report as provided in paragraph II of this order, duly authorized representatives of the Commission shall, upon written request and on reasonable notice to Skyline or Action mailed to their principal office, be permitted reasonable access, during the office hours of the company, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the company solely for the purpose of verifying any matter contained in the reports required under paragraph II of the order. Duly authorized representatives of the Commission shall also be permitted to interview appropriate officers and employees of Skyline or Action, who may have counsel present, regarding any such matters. Such verification and interviews are subject

to any recognized privilege under the laws of the United States and are also subject to the reasonable convenience of the company.

V

Confidential information obtained by the means provided in paragraphs II, III, and IV, above, shall only be made available to the Commission or its representatives and shall not be divulged by any representative of the Commission, to any person other than a duly authorized representative of the Commission, except as required in the course of legal proceedings to which the Commission is a party for the purpose of securing compliance with the order or as otherwise required by law, upon 10 days' written notice to Skyline or Action.

This order shall become effective upon the date of its publication in the Federal Register.

In the Matter of CERTAIN THERMOMETER SHEATH PACKAGES	Investigation No. 337–TA–56

Notice of Commission Hearing on the Presiding Officer's Recommendation and on Relief, Bonding, and the Public Interest, and of the Schedule for Filing Written Submissions

Recommendation of the presiding officer

In connection with the U.S. International Trade Commission's investigation under section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), of alleged unfair methods of competition and unfair acts in the importation and sale of certain thermometer sheath packages in the United States, the presiding officer filed his recommended determination on May 3, 1979, that the Commission determine that there is no violation of section 337. The presiding officer certified the evidentiary record to the Commission for its consideration. Interested persons may obtain copies of the presiding officer's recommendation (and all other public documents) by contacting the office of the Secretary to the Commission, 701 E Street NW., Washington, D.C. 20436; telephone 202–523–0161.

Commission hearing scheduled

The Commission will hold a hearing beginning at 10 a.m., e.d.t., on June 28, 1979, in the Commission's hearing room (room 331), 701 E Street NW., Washington, D.C. 20436, for two purposes. First, the Commission will hear oral arguments on the presiding officer's recommendation that there is no violation of section 337 of the Tariff Act of 1930, as amended. Second, the Commission will hear oral presentations concerning appropriate relief, bonding, and the public-interest

factors for consideration in the event that the Commission determines that there is a violation of section 337. These matters are being heard on the same day in order to facilitate the completion of this investigation within time limits established under law and to minimize the burden of this hearing upon the parties to the investigation. The procedure for each portion of the hearing follows.

Oral argument concerning the presiding officer's recommendation

A party to the Commission's investigation or an interested agency wishing to present to the Commission an oral argument concerning the presiding officer's recommendation will be limited to no more than 30 minutes. A party or interested agency may reserve 10 minutes of its time for rebuttal. The oral arguments will be held in this order: Complainants, respondents, interested agencies, and Commission investigative staff. Any rebuttals will be held in this order: Respondents, complainants, interested agencies, and Commission investigative staff.

Oral presentations on relief, bonding, and the public interest

Following the oral arguments on the presiding officer's recommendation, a party to the investigation, an interested agency, a public-interest group, or any interested member of the public may make an oral presentation on relief, bonding, and the public interest.

1. *Relief.*—If the Commission finds a violation of section 337, it may issue (1) an order which could result in the exclusion from entry of certain thermometer sheath packages into the United States or (2) an order which could result in requiring respondents to cease and desist from alleged unfair methods of competition or unfair acts in the importation and sale of these thermometer sheath packages. Accordingly, the Commission is interested in what relief should be ordered, if any.

2. *Bonding.*—If the Commission finds a violation of section 337 and orders some form of relief, such relief would not become final for a 60-day period, during which the President would consider the Commission's report. During this period the thermometer sheath packages would be entitled to enter the United States under a bond determined by the Commission and prescribed by the Secretary of the Treasury. Accordingly, the Commission is interested in what bond should be determined, if any.

3. *The public interest.*—If the Commission finds a violation of section 337 and orders some form of relief, it must consider the effect of that relief upon the public. Accordingly, the Commission is interested in the effect of any exclusion order or cease and desist order upon (1) the public health and welfare, (2) competitive conditions in the

U.S. economy, (3) the production of like or directly competitive articles in the United States, and (4) U.S. consumers.

Those persons making an oral presentation on any or all of the above topics will be limited to 15 minutes, with an additional 5 minutes each for summation after all presentations have been made. Participants with similar interests may be required to share time. The order of oral presentations will be as follows: Complainants, respondents, interested agencies, public-interest groups, other interested members of the public, and Commission investigative staff. Summations will follow the same order.

How to participate in the hearing.—Any person desiring to appear at the Commission's hearing must file a written request to appear with the Secretary to the U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, no later than the close of business (5:15 p.m., e.d.t.) on June 21, 1979. The written request must indicate whether such person wishes to present an oral argument concerning the presiding officer's recommendation and/or an oral presentation concerning relief, bonding, and the public interest. While only parties to the Commission's investigation, interested agencies, and the Commission investigative staff may present an oral argument concerning the presiding officer's recommended determination, public-interest groups and other interested members of the public are encouraged to make an oral presentation concerning the public interest.

Written submissions to the Commission

The Commission requests that written submissions of three types be filed no later than the close of business on June 21, 1979.

1. *Briefs on the presiding officer's recommendation.*—Parties to the Commission's investigation, interested agencies, and the Commission investigative staff are encouraged to file briefs concerning exceptions to the presiding officer's recommendation. Briefs must be served on all parties of record to the Commission's investigation on or before the date they are filed with the Secretary. Statements made in briefs should be supported by references to the record. Persons with the same positions on the issues are encouraged to consolidate their briefs, if possible.

2. *Written comments and information concerning relief, bonding, and the public interest.*—Parties to the Commission's investigation, interested agencies, public-interest groups, and any other interested members of the public are encouraged to file written comments and information concerning relief, bonding, and the public interest. These submissions should include a proposed remedy, a proposed determination of bonding, and a discussion of the effect of the proposals on the

public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers.

3. *Requests to participate in the hearing.*—Written requests to appear at the Commission hearing must be filed by June 21, 1979, as described above.

Additional information

The original and 19 true copies of all briefs and written comments and any written request to participate must be filed with the Secretary to the Commission.

Any person desiring to discuss confidential information, or to submit a document (or a portion thereof) to the Commission in confidence, must request in camera treatment. Such request should be directed to the chairman of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. Documents or arguments reflecting confidential information approved by the Commission for in camera treatment will be treated accordingly. All nonconfidential written submissions will be open to public inspection at the Secretary's office.

Notice of the Commission's investigation was published in the Federal Register of July 25, 1978 (43 F.R. 32195).

By order of the Commission.

Issued: June 1, 1979.

KENNETH R. MASON,
Secretary.

Index

U.S. Customs Service

Customs Court

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U.S. CUSTOMS SERVICE
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